87 No. 1732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARIE DUCHENEAUX,

Petitioner,

vs.

SECRETARY OF THE INTERIOR OF THE UNITED STATES,

Respondent,

JUNE ELLEN DUCHENEAUX LEDBETTER, LILLIAN LYNN DUCHENEAUX, RIA ELAINE DUCHENEAUX SEABOY, ORVILLE ROLLAND DUCHENEAUX, LARRY DOUGLAS DUCHENEAUX, DEANNE DUCHENEAUX MULLOY; ALLEN THEODORE DUCHENEAUX, MARLENE KAY DUCHENEAUX; SUPERINTENDENT OF CHEYENNE RIVER AGENCY AND UNITED STATES BUREAU OF INDIAN AFFAIRS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. District Court have jurisdiction pursuant to 5 U.S.C. Sec 706 of the Administrative Procedure Act to exclude real property found to be improperly included in the estate of an Indian spouse as property held in trust by the United States under 43 CFR 4.273(a)(b)(c)?
2. Did the Circuit Court of Appeals, Eighth Circuit, improperly reverse the U.S. District Court on the grounds that the Quiet Title Act, 28 U.S.C. Sec 2409 is applicable to Petitioner's case?
3. Did the Circuit Court of Appeals, Eighth Circuit improperly reverse the U.S. District Court in viewing the case and the District Court decision as an attempt to override the will of an Indian rather than excluding property of said Indian's white wife improperly included in an Indian's estate?

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NO.

MARIE DUCHENEAUX,

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v.

SECRETARY OF THE INTERIOR OF THE UNITED STATES, *et. al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Marie Ducheneaux, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 26, 1988 reversing the judgment of the United States District Court for the District of South Dakota entered October 24, 1986.

OPINIONS BELOW

The following copies of opinions are attached with appendix as shown.

Court of Appeals Memorandum Decision demoninated 87-5023 entered January 26, 1987 marked Appendix A reversing District Court.

District Court Memorandum Decision dated October 24, 1986 (Case CIV85-5161) marked Appendix B.

Decision of Administrative Law Judge (ALJ) for the Department of Interior denying the claim of the Petitioner seeking exclusion of her interest in the real property from the inventory in estate of spouse dated August 4, 1983 marked as Appendix C.

Decision of the Interior Board of Appeals affirming the decision of ALJ decided May 31, 1985 marked Appendix D.

Reference is had to Appendix filed with the Court of Appeals by the Secretary of the United States Department of Interior which includes Plaintiffs' complaint.

JURISDICTION

Jurisdiction is conferred on the District Court by 5 U.S.C. Section 706 Adminstrative Procedures Act giving the District Court the power to review agency action. Constitutional provisions involved are Articles V and XIV.

STATEMENT OF THE CASE

As recognized by the United States Court of Appeals Eighth Circuit in its memorandum decision the facts are thoroughly set out in the District Courts opinion, *Ducheneaux v. Secretary of the Interior*, 645 F Supp. 930 (D. SD 1986).

Briefly. Douglas Ducheneaux, an enrolled member of the Cheyenne River Sioux Tribe married Marie Ducheneaux (Snoble), a white person, non-Indian, February 3, 1948. Douglas died testate April 11, 1980. Marie and Douglas through their joint efforts bought

5 quarter sections of land on the Cheyenne River Reservation. As each quarter was acquired title was placed in trust with the United States in the name of Douglas Leonard Ducheneaux. Patent was issued pursuant to the act of June 18, 1934 (48 ST. 984). The land was placed in "trust status" in order to avoid the payment of state and local taxes.

The couple separated in 1971. Douglas commenced a divorce proceeding which the State Court refused to complete. Marie then unsuccessfully attempted to seek a partition of the land in federal court in South Dakota.

Douglas left a will executed January 24, 1980 leaving all of his estate to certain of his nieces and nephews.

Said will was admitted to probate by an Administrative Law Judge (ALJ) for the Department of Interior.

Marie filed a claim in the Indian probate establishing that she had an interest in the land in question since the land had been acquired by the joint efforts of both thus giving rise to a resulting or constructive trust and that the land to the extent of her interest was improperly included in the inventory of the estate; that BIA Regulations (43 CFR 4.273(a)(b)(c) requires the Administrative Law Judge to conside this question since said sections deals with improperly included property and its related provision, section 4.272 with omitted property.

The Interior Board of Indian Appeals recognized the right of Marie to so claim and in its decision (13 IBIA 177–Appendix D) included a standing order under 43 CFR 4.337(a) routinely referring to the Ad-

ministrative Judge handling an Indian probate proceeding any questions concerning equitable title to the assets listed in the inventory of a decedents' trust estate prepared by the BIA whenever the issue is raised in light of the Solicitor's position that Administrative Judges are better equipped than BIA officials to decide this type of issue.

The complaint filed in Federal Court sought a judicial review of the administrative decision of the United States Department of Interior and the United States is a party under 5 U.S.C. Section 702.

The decision of the Department of Interior not to recognize the interest of Marie, a white person, held by the Government in trust and which was improperly included in the estate property under 43 CFR 4.273 was arbitrary and capicious and deprives Marie of property without due process in violation of the 5th Amendment to the U.S. Constitution.

ARGUMENT

Clearly the United States Court of Appeals Eighth Circuit has decided an important question of Federal Law which has not been, but should be settled by the Supreme Court and/or has decided a federal question in a way in conflict with applicable decisions of this court.

This case involves the fundamental rights of an American spouse to her property which she is entitled to save for the erroneous conclusion of the Court of Appeals that two legal principles apply to the facts.

There are many marriages of white to Indian persons and the precise point has not been previously addressed. Here real estate acquired through the joint

efforts of Marie (a white person) and Douglas (an Indian) was placed with the United States in Trust in the name of Douglas to escape taxes. This arrangement should be considered as a nullity to the extent of Marie's interest.

In response by the Interior Board of Indian Appeals the United States solicitor's office advised:

> "A survey of BIA and Solicitor's Office personnel has uncovered no instances in which resulting trusts have ever been recognized or even considered by the BIA. It would appear, however, that at least one administrative law judge has recognized a resulting trust to Indian trust property in favor of an Indian wife, although Judge Boos did not call it a resulting trust. In *Estate of Yellow Bird*, IPBI 600 B (1980), the wife of the decedent petitioned for a reopening of the case asserting that certain property, which was held in trust solely in her husband's name had been purchased by their joint labors; therefore she should be deemed to own a one-half interest in such property. Judge Boos agreed, citing *Conroy v. Conroy*, 575 F.2d 175 (1978)1/, and ordered a modification of the estate inventory to reflect her one-half interest in the acquired property. Judge Boos' order was apparently never appealed to the Board, and the recognition of resulting trusts in Indian trust property is therefore one of first impression. Moreover, this issue, as it applies to Indian trust property, has never been presented to the federal courts. See *Akers v. Morton*, 499 F.2d 44, n.1 (9th Cir. 1974).
>
> "We believe that administrative judges do possess the requisite authority to determine whether

a resulting trust to Indian trust property should be recognized." (s.) Page 4

Additionally the Solicitor's Office advised

"Admittedly, no statute expressly authorizes an Administrative Judge to modify an estate inventory based on a resulting trust theory; however, we believe this authority is inherent in the administration and settlement of decendent's estate, as is the payment of creditors claims. See Estate of Spotted Horse Sr. IBIA 265 (1974).

"Further, thus authority is implicitly recognized in the regulations applicable to the probating of Indian Estates. If a party of interest believes that property has been improperly included with the inventory of an estate, such party may petition for the modification of the inventory to exclude the property. 43 CFR Sec 4.273(a). The administrative law judge is authorized to review the record of the title, conduct a hearing, if appropriate, and enter a final decision based on his findings modifying or refusing to modify the inventory. 43 CFR Sec 4.273(b) and (c)

28 U.S.C.A. Section 2409 (QTA) relied on by the Court of Appeals is not applicable. The statute does not "apply to trust or restricted Indian lands." Likewise the cases cited in its decision are clearly distinguishable from the case as to facts and the parties.

The Department of Interior having failed to modify the inventory to Marie's property, the District Court had specific authority under 5 U.S.C.A. Section 706 to enter the decision and order the relief it did. To do otherwise is to render the statute meaningless. *Sampson v. Andrus*, 483 F. Suppl 240.

Conroy v. Conroy, 575 F. 2d 175 8th Cir 1978 is in point. There partition of trust property held in husband's name was approved by the Federal Court.

The Court of Appeals seeks to distinguish *Conroy v. Conroy* because the parties were Indians. That we submit is rank discrimination. Regent of University of California 438 U.S. 360; *Kahn v. Shevin*, 416 U.S. 351.

We rely on *Bailess v. Paukune*, 344 U.S. 171 as to the nature of the Government's role in the instant case.

In *Bailess v. Paukune, supra*, an Indian devised to his widow who was not herself an Indian an interest in realty held in trust for himself by the United States. The Court held the trust became dry and passive in which the only duty remaining to be performed by the trustee was the ministerial act of issuing fee patent to cestui.

Justice Douglas wrote:

> "If Juana is not an Indian the United States has no interest of hers in the land to protect. Thus the United States holds the legal title to the land. But nothing in the Act prevents the devolution of the equitable interest of the widow. If she is not within the class whom Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the cestui."

The facts of this case are similar to what the court had before it in *Akers v. Morton*, 499 F. 2nd 44 (1974) with two important added ingredients.

Marie's claim to an interest in the property was established in the course of the probate of her husband's estate and asserted in the proceeding before the Secretary and District Court.

The comment and question posed by Judge Hufstedler in *Akers v. Morton*, should be passed on by this court.

That comment was:

> "Title in Mrs. Akers under a resulting trust theory was neither asserted in the proceedings before the Secretary or District Court or argued before this Court. We therefore do not address the question of whether the restricted land was properly included in Mr. Aker's Estate." (CF 25 SFR Sec 15.32) (1958)

The second legal principle annunciated by the Circuit Court of Appeals Eighth Judicial Court is fully answered by the Memorandum Decision of the District Court.

> "Additionally, while the deceased husband was permitted to disinherit his wife under the existing law of the state of South Dakota, he could do so only as to his own property interest. No South Dakota law exists which would permit the husband to disinherit his wife from her own property. His will would not affect his wife's property interest at all. Assuming that one concludes that the Plaintiff is indeed the owner of a property interest, what the husband does or does not say in his will as to this interest is of no consequence."(Page 15 *Ducheneaux v. Secretary of the Interior of the United States, supra.*)

Marie has a vested property right which may not be deprived without due process. Article V U.S. Constitution

CONCLUSION

WHEREFORE Petitioner respectfully asks the Supreme Court of the United States to issue the said writ of certiorari.

Respectfully submitted,

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Phone 1-605-845-7207

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-5023

MARIE DUCHENEAUX,	)	
	)	
Appellee,	)	Appeal from the United States District Court for the District of South Dakota.
	)	
v.	)	
	)	
SECRETARY OF THE INTERIOR OF THE UNITED STATES,	)	
	)	
	)	
Appellant,	)	
	)	
JUNE ELLEN DUCHENEAUX LEDBETTER; LILLIAN LYNN DUCHENEAUX; RIA ELAINE DUCHENEAUX SEABOY; ORVILLE ROLLAND DUCHENEAUX; LARRY DOUGLAS DUCHENEAUX; DEANNA DUCHENEAUX MULLOY; ALLEN THEODORE DUCHENEAUX; MARLENE KAY DUCHENEAUX; SUPERINTENDENT OF CHEYENNE RIVER AGENCY and UNITED STATES BUREAU OF INDIAN AFFAIRS,	)	
	)	
Appellant.	)	

No. 87-5024

MARIE DUCHENEAUX,	)	
	)	
Appellee,	)	
	)	
v.	)	
	)	

SECRETARY OF THE INTERIOR OF THE UNITED STATES; JUNE ELLEN DUCHENEAUX LEDBETTER; LILLIAN LYNN DUCHENEAUX; RIA ELAINE DUCHENEAUX SEABOY; ORVILLE ROLLAND DUCHENEAUX; LARRY DOUGLAS DUCHENEAUX; DEANNA DUCHENEAUX MULLOY; ALLEN THEODORE DUCHENEAUX; MARLENE KAY DUCHENEAUX,

Appellants.

SUPERINTENDENT OF CHEYENNE RIVER AGENCY AND UNITED STATES BUREAU OF INDIAN AFFAIRS.

Submitted: September 4, 1987
Filed: January 26, 1988

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGIL, Circuit Judge.

In this case we examine the district court's ruling that the theory of spousal contribution applied to divest an Indian's heirs of the land held in trust for him by the United States. We conclude that the district court lacked jurisdiction to order apportionment of the trust property and erroneously overrode a valid will. Accordingly, we reverse.

I. BACKGROUND

The facts and procedural history are thoroughly set out in the district court's opinion, *Ducheneaux v. Secretary of*

the Interior, 645 F. Supp. 930 (D. S.D. 1986), and will only be summarized here.

Douglas Ducheneaux, a member of the Cheyenne River Sioux Tribe, married Marie Snoble, a non-Indian, in 1948. During the marriage, the couple bought five quarter sections of land on the Cheyenne River Indian Reservation in South Dakota. The land was placed in Douglas' name and held in trust for him by the United States.[1]

The couple separated in 1971, after twenty-two years of marriage. Douglas began but never completed divorce proceedings. Marie then tried unsuccessfully to get partition of the land, but it remained in trust for Douglas.

Douglas died nine years after their separation. In his will he left his whole estate to his nieces and nephews, all enrolled members of the Cheyenne River Sioux Tribe. He expressly disinherited Marie.

Marie filed objections to the will and sought half of the land acquired during the marriage, alleging that she had contributed in equal part to its acquisition, financially and through her labors as a wife. She claimed that the land should be characterized as being held in a resulting or constructive trust for her benefit. An Administrative Law Judge (ALJ) for the Department of the Interior denied her claim to the land, holding that in view of the unique status and purpose of Indian trust land, the United States

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[1] Under the allotment system, created by the Indian General Allotment Act of February 8, 1887, Ch. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331, *et seq.*, the United States gave Indians allotments, or parcels, of former reservation land, in order to assimilate them into white society by familiarizing them with property ownership and cultivation. To protect the Indian property owner from unscrupulous acquisitions, the United States held legal title to the parcels in trust for the Indian. The land remains exempt from state and local taxes during the trust period. *See Nichols v. Rysavy*, 809 F.2d 1317, 1320-23 (8th Cir.), *cert. denied*, 108 S.Ct. 147 (1987), for a more in-depth discussion of the allotment system.

owed no trust responsibility to Marie because she is a non-Indian. The denial of relief was affirmed on appeal to the Interior Board of Indian Appeals, and thus became the final decision of the Secretary of the Interior. Marie then appealed to the district court.

The district court reversed, holding that the theory of spousal contribution was applicable because Marie had contributed as much to the acquisition of the property as had her husband. The district court concluded that because she owned an interest in the property, it was hers no matter how Douglas purported to dispose of it in his will. The district court ordered that Marie receive an undivided one-half interest in the property as well as one-half of the rents and profits from the entire five quarter sections of land as of the date of Douglas' death.

II. DISCUSSION.

Although the district court had appealing and persuasive equitable reasons for ruling as it did, it did not accord sufficient weight to two well-established legal principles which require a contrary result.

A. Applicability of Quiet Title Act.

First, as the district court noted, the United States holds legal title to an Indian's allotted parcel of land under the allotment system. 645 F. Supp. at 935. As appellants point out, however, the district court did not expressly consider the effect of the Quiet Title Act, 28 U.S.C. § 2409a (QTA), on this case.[2] The QTA prohibits a party from suing the United States when the purpose of the suit is to challenge the government's title to land held in trust for Indians.

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[2] The QTA provides, in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands* * * *. (Emphasis added.)

As the Supreme Court recently stated, while examining the scope of the QTA in *United States v. Mottaz*, 106 S. Ct. 2224, 2230 (1986):

> [The QTA] operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians. * * * Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.

Because Marie's suit claims an interest in property to which the United States holds title, the *Mottaz* reasoning applies to this case, and, as discussed further, deprived the district court of jurisdiction.

The district court did not discuss the QTA, but asserted jurisdiction pursuant to 5 U.S.C. § 706 of the Administrative Procedure Act (APA).[3] In our view this assertion was erroneous. In *Block v. North Dakota, ex rel. Board of University and School Lands*, 461 U.S. 273 (1983), the Supreme Court held that the QTA is the only means by which adverse claimants can challenge the United States' title to real property. *Block*, 461 U.S. at 286.

This court, in *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), has also held that the QTA bars actions to adjudicate a disputed title to Indian real property in which the United States claims no interest. The *Spaeth* appellants were non-Indians who sued to clear title to land they had purchased, land which was allegedly trust property. We rejected appellants' contention that section 702 of the APA provided the necessary consent for their suit against the United States, because

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[3] Section 706 of the APA generally gives a district court the power to review agency action.

that section provides that "[n]othing herein confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Spaeth*, 757 F.2d at 942. The *Spaeth* court concluded that if the United States showed a substantial possibility that the lands in dispute were "trust or restricted Indians lands," then the QTA applied to bar appellants' suit against the United States. *Id.* at 943.

The Supreme Court's analysis in *Block* that the QTA preempts review under the APA was also adopted by the Eleventh Circuit in *State of Florida v. United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). In *State of Florida*, Florida filed a suit, asserting jurisdiction under the APA, challenging the Secretary's decision to take land in trust for the Seminole Tribe. Florida insisted that its suit was not a quiet title action because it neither sought quiet title, nor did it seek recognition of any property interest in the land at issue. Florida alleged that the APA waived the United States' immunity from suit, because section 702 of the APA waives federal soveign immunity where the claimant seeks nonmonetary relief in a suit against federal officers.

The court rejected Florida's argument, noting:

> [T]he QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property. To permit otherwise, the Court reasoned [in *Block*], would allow the QTA's carefully crafted limitations on the availability of relief to be circumvented, thereby rendering the Indian lands exception, among other things, null. The Court declined to consider the APA waiver of sovereign immunity as a supplemental remedy to the extent that the QTA would forbid the relief sought, invoking the exception to the APA

> waiver where another statute forbids the relief sought. (Citations omitted.)

State of Florida, 768 F.2d at 1254.

The Eleventh Circuit continued:

> Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interferring with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance. (Footnotes omitted.)

State of Florida, 768 F.2d at 1254-55; *see also*, *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987).

Thus, because application of the QTA preempts application of the APA, and because the QTA does not waive the sovereign immunity of the United States as to land held in trust for Indians, we hold that the district court was without jurisdiction over this suit.

Marie argues, however, that this court's decision in *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978), is controlling and should apply here. *Conroy*, however, fails to support her position. In *Conroy*, a husband and wife, both members of the Oglala Sioux Tribe, sought a divorce. During their marriage they accumulated about 1,700 acres of land which the United States held in trust for Mr. Conroy. The Oglala Tribal Court granted the divorce and awarded Mrs. Conroy roughly half the trust land. The district court and this court affirmed.

In affirming, we noted the variety of explicit provisions in the Constitution and Revised Code of the Oglala Sioux Tribe which gave the Tribe power to grant divorces and provide for the wife and children following a divorce. Because the Oglala Tribal Constitution and Code contained no provision exempting any category of property from the power of the Oglala Tribal Court, there was "no valid jurisdictional impediment to its decree." *Conroy*, 575 F.2d at 183. Thus, our holding in *Conroy* was premised in large part upon a recognition of the validity of tribal court jurisdiction as to matters involving members of its tribe.

The *Conroy* court next examined Mr. Conroy's contention that the provisions of the General Allotment Act which prescribed involuntary alienation of allotments in trust thereby removed trust land from the reach of the Tribal Court. *Id.* In examining the question, this court noted that the purpose of the Act was to protect Indians. We concluded that the Act would not "negate a valid decree of a competent [tribal] tribunal," because the Act did not "support the denial *to an Indian* * * * of her rightful claim to valuable property." *Id.* (Emphasis added.)

Thus the key difference between *Conroy* and this case is that in *Conroy*, the Tribal Court's partition of the trust property between two Indians did not divest the United States of its legal title to the property as trustee, but merely substituted different Indian beneficiaries. Conse-

quently, it was not necessary to join the United States to that action. *See Conroy*, 575 F.2d at 178, 180. Here, however, enforcing the district court's order would divest the United States of its trust responsibility over the land awarded to Marie. Because, as discussed above, no court has jurisdiction to divest the United States of land held in trust for Indians, Marie's suit must fail.

B. Authority to Override a Valid Will.

Assuming *arguendo* that the jurisdictional issue were not dispositive in this case, the district court was without authority to override Douglas' valid will.[4] The Supreme Court has spoken clearly on this issue in two cases.

In *Blanset v. Cardin*, 256 U.S. 319 (1921), an Indian woman left a will disposing of allotted land which did not include her husband as a beneficiary. Her husband, a non-Indian, sought a one-third interest in the land, stating conclusively:

> In a word, the act of Congress [25 U.S.C. § 373, governing the validity of Indian wills] is complete

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[4] 25 U.S.C. § 373, which governs the disposal by will of allotments held under trust, provides in pertinent part:

> Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior:
>
> * * * *
>
> *Provided further*, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period * * *. (Emphasis in original.)

> in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code.

Blanset, 256 U.S. at 326.

The Court continued:

> [I]t was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.

Id. at 326-27.

More recently, in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), the Supreme Court overturned the Secretary of the Interior's invalidation of an Indian's will. In his will the Indian testator had left nothing to his daughter, and the Secretary concluded that it would be inappropriate to "perpetuate this utter disregard for the daughter's welfare * * *." *Tooahnippah*, 397 U.S. at 602. The Supreme Court stated:

> To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. * * * [W]e cannot assume that Congress, in giving testamentary power to Indians respecting their ~~allotted~~ property with the one hand, was taking that power away from the other by vesting in the Secretary the same degree of authority to disapprove such a disposition.
>
> * * * *

> Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. § 373, we perceive nothing in the statute or its history of purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." (Footnote omitted.)

Id. at 608-10.

In *Akers v. Morton*, 499 F.2d 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975), the Ninth Circuit confronted a situation similar to that presented here. Mr. Akers, an Indian, expressly disinherited his wife, also an Indian, from his will. Mrs. Akers asserted a dower right in the land conveyed by the will, land that had been acquired with her funds, but which had been titled as trust land in Mr. Akers' name. The Ninth Circuit held that even though the results were often inequitable, "[a]lienation of restricted Indian allotment land is controlled by federal law. Montana's dower law cannot of its own force entitle Mrs. Akers to claim a wife's interest in her deceased husband's restricted lands." *Akers*, 499 F.2d at 46. The court later stated: "The Secretary may disapprove a will only if it is technically deficient or if it is irrational. Where, as in this case, it is rational * * *, the Supreme Court has indicated that the Secretary is not free to disapprove the will merely on notions of fairness or equity." *Id.* at 47, citing *Tooahnippah*, 397 U.S. at 610.

We believe this clear line of cases compels the conclusion that the district court erred in overriding the explicit provisions of Douglas' validly-executed will. Accordingly, we reverse the decision of the district court and reinstate the decision of the Secretary of the Interior.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

MARIE DUCHENEAUX,	)	CIV. 85-5161
	)	
Plaintiff,	)	MEMORANDUM
	)	OPINION
vs.	)	
	)	
SECRETARY OF THE INTERIOR OF THE UNITED STATES, JUNE ELLEN DUCHENEAUX LEDBETTER, LILLIAN LYNN DUCHENEAUX, RIA ELAINE DUCHENEAUX SEABOY, ORVILLE ROLLAND DUCHENEAUS, LARRY DOUGLAS DUCHENEAUX, DEANNE DUCHENEAUX MULLOY, MARLENE KAY, DUCHENEAUX, ALLEN THEODORE DUCHENEAUX, SUPERINTENDENT OF CHEYENNE RIVER AGENCY, AND U.S. BUREAU OF INDIAN AFFAIRS,	)	
	)	
Defendants.	)	

This case is before the Court on a judicial review of the decision of the United States Department of the Interior, which denied Plainitff her claimed interest by reason of her contribution during marriage in certain land held in trust by the government. Jurisdiction is conferred upon the Court by 5 U.S.C. § 706.

Individual defendants are nieces and nephews of Douglas Leonard Ducheneaux, deceased, husband of the Plaintiff. Defendant Secretary of the Interior of the United States is joined as an indispensable party since the property in question is held in trust under 25 U.S.C. § 465.

FACTS

Marie Ducheneaux (wife) is the widow of Douglas Leonard Ducheneaux (husband). She is a non-Indian. He was an enrolled member of the Cheyenne River Sioux Tribe, who died testate on April 11, 1980, at the age of 65. At the time of his death the couple had been married for 32 years. During the last nine years the parties had been separated.

The couple was married on February 3, 1948. He was 34 and she was 41. She had about $4,000 in assets at the time of the marriage, including money in a bank account, furniture, and household appliances. The record shows the only property brought to the marriage by the husband was his allotment of 160 acres of trust land situated on the Cheyenne River Indian Reservation. Some of Plaintiff's money was used to purchase a store and gas station in Winner, South Dakota, which became the first business venture of the parties. For a time after the marriage the couple operated the store and gas station, but in the early 1950s they sold the business and moved to the Cheyenne River Indian Reservation. The parties started in the ranching business with the aid of the wife's contribution of money and her husband's contribution of 160 acres of trust land.

After the couple moved to the reservation they experienced the rigors of ranch and reservation life. They initially lived in a quonset building with no electricity or running water. The building was heated by a wood-burning stove. As was the case with most ranch couples, the wife kept house, gardened, and raised and sold some chickens. The proceeds from the sale of the store and gas station in Winner were used to buy livestock and for ranching expenses.

The wife remained on the reservation until the parties separated in 1971. The husband remained until his death. During the marriage five quarters of trust land were pur-

chased from other Indian owners. This constitutes the property which is the subject of this action. These quarters were adjacent to the husband's original quarter section. The land purchased was trust land and as it was purchased from time to time it was continued in trust by the United States government for Douglas Leonard Ducheneaux.[1] The land was placed in "trust status" in order to avoid the payment of state and local taxes. That this was the purpose of the trust arrangement is without dispute. Since the husband was Indian and property could only be held in trust for Indians, the Plaintiff was not recognized by the government as having any interest in the land.

Shortly after the parties separated the husband started divorce proceeding in the South Dakota Circuit Court on August 23, 1971. These proceedings were never completed, although the couple remained separated and apparently did not see one another after that date.

On March 20, 1972, the husband was ordered to pay $150 per month as temporary support to the wife. The

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[1] The patents granted to the decedent stated in part:

> [P]ursuant to the Act of June 18, 1934, (48 St. 984), a trust patent issued to Douglas Leonard Ducheneaux, an Indian of the Cheyenne River Sioux Tribe, for the following described land:
>
> (Description of land)
>
> NOW KNOW YE, that the UNITED STATES OF AMERICA, in consideration of the premises, hereby declares that it does and will hold the land above described (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to the said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names the patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law.

divorce was not granted because a property settlement could not be reached and the state trial court felt that it did not have jurisdiction to divide or dispose of the reservation property (including trust status property) absent such agreement. Any division of the trust property would have to be approved by the Secretary of the Interior upon an application submitted by the husband as trust beneficiary. Since the husband would submit no application and the State Circuit Court felt it lacked jurisdiction, the matter languished up to the time of the husband's death.

When the state court refused to complete the divorce proceedings, the wife unsuccessfully attempted to seek partition of the land by an action in federal court in South Dakota.[2]

During the period of separation the court-ordered $150 monthly support payment was unilaterally discontinued by the husband, necessitating further nonsupport proceedings. The action was settled by the husband agreeing to reinstate the payments. The payments continued until the death of the husband.

A few months before this death, the husband executed a will which expressly disinherited Marie Ducheneaux and left his entire estate to the children of his half-brother, Allen Theodore Ducheneaux.[3] The seven individual beneficiaries are "Indians" under federal law.

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[2] This action, Civ. 72-3007, was commenced in the United States District Court for the District of South Dakota (Central Division). By a memorandum decision on November 21, 1972, District Judge Andrew W. Bogue held that the court did not have subject matter jurisdiction. The court stated that the complaint alleged neither "diversity of citizenship" nor "federal question." The court held that the right to a partition of the property was not based on a right granted by either the federal constitution or a federal statute. No appeal was taken from this judgment or dismissal.

[3] The will dated January 24, 1980 (two and one-half months before the husband's death) provided with respect to his wife as follows:

NATURE AND PROCEDURAL HISTORY

Subsequent to the husband's death the Plaintiff filed objections to the will. Hearings on the will were held on July 23, 1980, and October 29, 1980. On August 4, 1983, Garry V. Fisher, ALJ, issued his Order Approving Will and Decree of Distribution. The order upheld the will and distributed all of the trust property to the seven nieces and nephews equally.

The Plaintiff raised the issue now before this Court namely, that except for the original allotment, the trust real estate was acquired by the parties through their joint efforts and accordingly she is entitled to an equal share in the property.

The ALJ rejected this claim. The ALJ held that the Plaintiff, a non-Indian, could not claim a trust relationship with the United States and therefore could claim no interest in "trust" property which under the law is held for Indians only. The ALJ enumerated the factors which led to his conclusion as follows:

> Several factors, considered duly proven in the record, lead to this conclusion. First, there is no trust relationship between the United States and Marie Ducheneaux. Whatever the motive for placing ownership of the purchased lands, the United States is not shown by the evidence to be a party to the transaction and there is no evidence of any consent by the government to hold any in-

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In thus making distribution of my property and the giving thereof as above mentioned, I am not unmindful of the fact that I am married to Marie Ann Ducheneaux, but we have been living separate and apart and it is my intention that said Marie Ann Ducheneaux shall not have any part of my estate whatsoever.

terest for the benefit of Marie Ducheneaux. If Marie permitted this situation to continue up to the death of the Testator, she is then the subject of a misplaced trust rather than any constructive or resulting trust. She has failed to produce any evidence that Testator undertook any obligation to her to preserve her interest in the properties. Secondly, the only word we have from the Testator is his written word in the will whereby he specifically disinherits his wife, Marie. This is actually evidence contrary to Marie's assertion that Testator had an understanding she owned an interest in the trust properties. If there were, he denied it by testamentary act. Thirdly, the law of the case is simple. *Tooahnippah v. Hickel*, 397 U.S. 599 (1970) clearly and unequivocally limits the authority of the Secretary of the Interior, where it is determined the testamentary act is voluntary, free from duress, undue influence or mistake. The Secretary must approve the will, though it be unfair or improvident, and may not substitute his judgment for that of the testator. Here the testator grants his trust estate to his nephews and nieces. Fourthly, the stipulation agreement establishing testator's obligation to pay support has the appearance at least of defining the relative positions of the parties to the marital separation. It is not considered here as definitive of all obligations of testator in his role as husband but since the separation was complete and permanent it was a significant time to assert whatever claim of right she had in the trust property. The claim of Marie Ducheneaux is denied.

The Plaintiff filed a petition for rehearing on September 16, 1983, which was denied by Keith L. Burrowes, ALJ, on October 3, 1983. She then appealed to the Interior Board of Indian Appeals (IBIA) on November 8, 1983.

On May 31, 1985, some 18 months later, the order of Administrative Law Judge Keith L. Burrowes was affirmed by Jerry Muskrat, Administrative Law Judge of the IBIA.

DECISION BY THE INTERIOR BOARD OF INDIAN APPEALS

While the Plaintiff originally had contended that the state court order requiring the monthly payment of $150 constituted a continuing obligation of the estate, that position appears to have been abandoned after the issue was resolved against the Plaintiff. The ALJ found that there was no evidence that either the original 1972 order establishing payments nor the 1974 order dismissing the complaint for nonsupport contained any requirement that the payments should become an obligation of the husband's estate. Therefore, the ALJ held that the wife was not entitled to such payments from the estate.

The ALJ next considered the issue of whether the Plaintiff was entitled to a portion of the trust property under the theory of a resulting trust by reason of her claim that the property was acquired by the joint efforts of both parties to the marriage. This was her contribution claim. The ALJ concluded that she could not claim a resulting purchase money trust in the Indian trust land because the federal government did not owe her any trust responsibility. This conclusion was based upon the concept of Indian trust status. The ALJ noted that the concept is intended for the benefit of Native Americans, although in some instances non-Indians may indirectly benefit from the special advantages of this form of property ownership. The ALJ held that the federal government does not owe a trust responsibility to Marie Ducheneaux and therefore cannot hold an interest in the land in trust for her.

THE STANDARD OF REVIEW

This appeal is governed by the Administrative Procedure Act and the scope of review enunciated in 5 U.S.C. § 706. The statute provides in part:

> **§ 706. Scope of review**
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> 1. . . .
>
> 2. hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

DEVELOPMENT OF THE INDIAN TRUST DOCTRINE

Statutes dealing with allotment of land to Indians are found at 25 U.S.C. § 461, *et seq.* The main statute is found at 25 U.S.C. § 465, which states in part:

> The Secretary of the Interior is hereby authorized, in its discretion, to acquire, through purchase, relinquishment, gift, exchange or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from state and local taxation.

The original idea behind the allotment acts was that the Indian population would eventually be assimilated and that reservations would become extinct. *Montana v. United States*, 450 U.S. 544, 559, 101 S.Ct. 1245, 67 L.Ed.2d 943 (1981). It was also designed to foster the elimination of tribal relations. *Id.* It was felt that private land ownership by individual Indians would advance their assimilation and help make the Indians self-supporting members of society. *North Cheyenne Tribe v. Hollow Breast*, 96 S.Ct. 1793, 425 U.S. 653, 48 L.Ed.2d 274 (1976). In addition, it would relieve the federal government of the task of supervision of Indian affairs. *Id.* However, in recent years federal policy has shifted away from the vigorous attempt to assimilate Indian Tribes. *Nebraska v. Andrus*, 586 F.2d 1212 (8th Cir. 1976).

Under the allotment system, the United States retains legal title to the allotted parcel, and the Indian's interest is recorded on a trust patent which usually reflects the language of the statute. *Id.* at 1218. (Citation omitted). The government, which has been called the historic guardian of Indian tribes. *Id.* at 1222. The allottee's land is not subject to alienation by him except with consent of the government. 25 U.S.C. § 348.

The courts have stated that Indians are wards of the nation dependent upon the government's protection and good faith. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Allowing Indians to have land in trust allegedly helps the Indian to "develop the initiative destroyed by a century of oppression and paternalism." *Florida v. Department of Interior*, 768 F.2d 1248 (11th Cir. 1985) [citations omitted]. *See also Mesqualero Apache Tribe v. Jones, 93 S.Ct. 1267, 411 U.S. 145, 36 L.Ed.2d 115 (1973); Cheyenne River Sioux Tribe v. Kleppe*, 424 F. Supp. 448, *rev'd on other grounds*, 556 F.2d 1085, *cert. denied*, 99 S.Ct. 83, 439 U.S. 820, 58 L.Ed.2d 111 (1977).

HUSBAND'S SUPPORT PAYMENTS

This Court takes no issue with the decision of the IBIA concerning the wife's claim that the husband's obligation to pay the monthly support payments of $150 survives his death. In South Dakota support payments required by the husband, unless expressly provided in the decree, do not survive the death of the husband. *Tyler v. Tyler*, 233 N.W.2d 804 (S.D. 1975). Moreover, the payments in this case were temporary support payments required to be paid prior to a final adjudication of divorce and property rights.

SPOUSAL CONTRIBUTION

It is axiomatic that a wife involved in a ranching or farming operation with her husband contributes just as

much as her husband to the success of the operation, although often in a different manner. Cooking the meals and caring for the home contributes to the success of the operation as does plowing the ground or caring for the livestock. The Plaintiff did this and more. The evidence indicated she attended to some of the business matters, i.e., she attended to the parties' checking account. The time has long passed when such contributions of a wife toward the acquisition of marital assets is thought to be of little or no consequence. Such contributions have been often recognized in the matter of estate taxation under 26 U.S.C. § 2033 (I.R.C. 1954). *See also Craig v. United States*, 451 F. Supp. 378 (S.D.C. 1978).

In *Craig*, Chief Judge Nichol of this Court held that a wife who pooled her capital and labors with her husband to conduct a family partnership farm, in essence, owned half of the farm materials. Mrs. Craig farmed with her husband for 43 years until his death. Her duties were to raise the children, keep the house, run an egg and butter business, tend to the hired help, help in the harvest, and other duties. In a dispute over estate taxes, the district court held that it could not:

> ignore the reality of the wife's contribution to the family farm in this situation. To hold for the defendant here would also thwart the obvious intent of the Craigs, which was to operate the farm in partnership with each one contributing equally in the work and the control and management. The facts indicate that it was also agreed that the hard-earned rewards of that labor would be reinvested into the business rather than be kept by each spouse for his or her personal economic choices. . . . This court will not ignore this farm wife's contribution to the success of the business. . . .

Id. at 382-83.

In a related vein, the case of *Conroy v. Frizzell*, 429 F. Supp. 918 (D.S.D. 1977), *affirmed*, 575 F.2d 175 (8th Cir. 1978), held that where two Indians were divorced and the trust land was in the husband's name, the wife had an enforceable property interest in the husband's land. This was so because the land had been acquired over a period of approximately 32 years by the parties' joint toil and efforts.

The IBIA decision provides, "Resulting money trusts in Indian land may not be claimed by persons to whom the federal government owes no trust responsibility." This Court finds no case or statutory authority supporting such a rule of law. Additionally, it misses the mark as outlined by the facts of this case. The right to claim the benefit of one's own property by way of a resulting trust or otherwsie does not depend upon one's race.

The IBIA arrived at its conclusion even after conceding that ". . . although such trusts have not been specifically addressed before, there appears to be no reason why they should not be recognized under appropriate circumstances." *Citing Estate of Jack R. Yellow Bird or Steele*, IP BI 600B80, IP BI 549C78.

The point that was missed by the Administrative Law Judge Muskrat is that the Plaintiff is not seeking to continue the land in trust status. She only seeks a property interest which is rightfully hers, obtained by years of contribution.

Additionally, while the deceased husband was permitted to disinherit his wife under the existing law of the state of South Dakota, he could do so only as to *his* own property interest. No South Dakota law exists which would permit the husband to disinherit his wife from her own property. His will would not affect his wife's property interest at all. Assuming that one concludes that the Plaintiff is indeed the owner of a property interest, what

the husband does or does not say in his will as to this interest is of no consequence.

One cannot look to the contents of a husband's will disinheriting a wife to determine ownership as to the wife's property interest. This, however, is exactly what ALJ Fisher did when he said, "This [the act of disinheriting his wife] is actually evidence contrary to Marie's assertion that Testator had an understanding she owned an interest in the trust properties. If there were, he denied it by testatmentary act." This Court knows of no rule, nor did the ALJ cite any rule of law, which gives support to such a statement. If the Plaintiff owned an interest in the property, it was owned irrespective of what testator said in his will and that interest could not be defeated by his own self-serving statement.

The ALJ misses the mark also by concluding that "the United States is not shown by the evidence to be a party to the transaction and there is no evidence of any consent by the government to hold any interest for the benefit of Marie Ducheneaux." The point is, there need be no consent on the part of the United States. Indeed, the United States undoubtedly did not know the purpose for which the husband and wife placed the property in trust. Certainly it would not have permitted the property to be placed in the wife's name. The rule was, and still is, that property can only be held in trust status for "Indians." The Plaintiff being a "non-Indian" would not have been permitted such trust status. The fact of the government's knowledge then is completely irrelevant to the issue of ownership.

In any case of claimed contribution the substance of ownership is the issue controlling ownership. If one conceded there exists a theory of contribution, such theory is applied in those cases where the courts go behind the mere manner in which ownership is listed and look behind such ownership to determine actual ownership by the one claiming contribution. Accordingly, in any issue of contribution

the theory of the wife's contribution may be asserted irrespective of actual facial ownership.

Finally, the ALJ based his decision in part on the fact that the Plaintiff "permitted this situation to continue up to the death of the Testator" and "she is then the subject of mis-placed trust rather than any constructive or resulting trust." This is a strained interpretation indeed. Of course she permitted the property to continue in trust. So did her husband. That was the whole purpose of the trust arrangement—to receive the benefits of such trust relationship. If she "mis-placed" her trust as suggested by the ALJ, her penalty should not be the forfeiture of her property interest to the very person in whom the trust was placed.

The theory of allocating contribution in marital property is not an "intriguing theory" as suggested by Judge Fisher. It rests on the basic premise that a wife's contribution is equally as important as the husband's. He may not deprive her of her hard-earned share by assuming her contribution is nothing and thereby assert a right to pass it on to others.

The decision of the IBIA as it relates to the claim of the Plaintiff as to one-half of the trust property is contrary to law, unsupported by any substantial evidence, as is arbitrary and capricious.

SUMMARY

By her efforts the wife contributed as much to the accumulated property as did her husband. She accordingly is entitled to the one-half interest which had been held in trust for him. The deceased husband may do as he wishes with respect to *his* property interest, but he cannot by his will alienate *her* property interest.

Accordingly, this matter is reversed, and the case remanded to the Secretary of the Interior to proceed in accordance with this memorandum.

The United States Department of Interior is directed to issue a deed of conveyance transferring all the right, title, and interest of an undivided one-half interest in the five quarters of real estate to the Plaintiff Marie Ducheneaux.

It shall be the further order of this Court that the United States Department of the Interior shall account to the Plaintiff for the rents and profits received from the undivided interest to which Marie Ducheneaux is entitled. Such rents and profits shall be determined from the date of death of Douglas Leonard Ducheneaux, and the amounts shall be paid to the Plaintiff Marie Ducheneaux. To the extent that any such rents and profits have been paid to the individually named defendants June Ellen Ducheneaux Ledbetter, Lillian Lynn Ducheneaux, Ria Eliane Ducheneaux Seaboy, Orville Rolland Ducheneaux, Larry Douglas Ducheneaux, Deanna Ducheneaux Mulloy, and Marlene Kay Ducheneaux, any future payments to them shall cease until the Plaintiff shall have recovered all amounts determined to be due hereunder.

This Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law.

Dated this 24th day of October, 1986.

BY THE COURT:
/s/RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, Clerk

By /s/Jeanee L Haag
Deputy

APPENDIX C

United States Department of the Interior

OFFICE OF HEARING AND APPEALS
Room 3451, 316 North 26th Street
Billings, Montana 59101

PROBATE NO.
IP BI 467C 80

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF DOUGLAS LEONARD DUCHENEAUX, DECEASED ALLOTTEE 3482 OF THE CHEYENNE RIVER INDIAN RESERVATION IN SOUTH DAKOTA	ORDER APPROVING WILL AND DECREE OF DISTRIBUTION

The matter of the last will and testament of Douglas Leonard Ducheneaux deceased Allottee 3482 of the Cheyenne River Indian Reservation in South Dakota, came on for consideration before the Administrative Law Judge, Office of Hearings and Appeals, United States Department of the Interior, Billings, Montana, by hearings duly noticed and held July 23, 1980, at Eagle Butte, South Dakota, and on October 29, 1980, at Mobridge, South Dakota.

The following Findings are made:

That Douglas Leonard Ducheneaux died April 11, 1980, at the age of 65 years, a resident of the State of South Dakota.

At the date of death the decedent was possessed of that trust or restricted property, real and personal, located on the Cheyenne River Indian Reservation in South Dakota, listed on the inventory attached, and other reporting documents.

That had he died intestate, his heir at law as determined under the laws of the State of South Dakota would have been as follows:

Marie A. Snoble Ducheneaux, Non-Indian, Wife, All

The following findings relate to the will and the claim of Marie Ducheneaux:

Testator and Marie Snoble were married February 3, 1948, and remained married until he died. They separated in 1971 and divorce proceedings were commenced but never completed. As a result of the separation Marie left the family home, took up residence first in Mobridge and then elsewhere; the separation was complete—they didn't see each other again. The separation was also marked by a court order in 1972 and later pursuant to a stipulation seeking dismissal of an action for non-support in 1974, that Testator was obligated to pay Marie $150.00 per month support money. A fair reading of the court order and the stipulation does not establish a right vested in Marie for the remainder of her life, nor obligate Testator's estate after his death. At most it created an enforceable obligation incurred by Testator based upon conditions and the continuation of those conditions. Contingencies such as death or remarriage were not specifically covered. The claim of Marie for continuance of the $150.00 per month payment after the death of testator is hereby rejected as not supported by contract.

The challenge to the will simply is not supported by the evidence. Testator, separated from his wife since 1971, clearly stated his intention that she not receive his estate after death. He chose the children of his brother, Ted. But despite effort at speculation that his poor health and contemplation of death may have influenced him to make a will on January 24, 1980, there purely and simply is no evidence that Testator was not of sound mind or subject to debilitating influence. The testimony of the subscribing

witnesses is clear and unequivocal. Exhibit 1 is a properly executed will and should be approved.

That being the case, we now turn to the intriguing theory advanced by Marie Ducheneaux that, except for the original allotment, the trust properties listed on the inventories were acquired by her and Testator through their joint effort, that she claims by constructive or resulting trust an equal share in those properties and her share is not subject to distribution pursuant to Testator's will. Marie was permitted to build her record and introduce a mass of evidence to prove her assertion that the ranching operation was expanded by purchase of lands placed in trust, the purchases being financed by proceeds from the rance, e.g. cattle sales, etc. I view that tenor and scope of the probate regulations, particularly those which procedurally outline the functions of the Administrative Law Judge, [and immediately ponder whether or not such a claim may be considered by or has been delegated to the Administrative Law Judge.] Although it can be argued that consideration of the claim merely defines the estate to be distributed in the probate proceeding, the delegation to hear probate cases does not extend to the overall administration of trust properties which is delegated to the Bureau of Indian Affairs. Moreover, Marie Ducheneaux, being non-Indian, cannot claim a trust relationship with the United States, nor claim an obligation flowing from the United States to administer her claimed interest in the lands. However, the broader authority of the Interior Board of Land Appeals, which includes the administrative appeals in addition to appeals in Indian probate, supplies an umbrella for ultimate consideration of the issue. I find the claim, on evidence, without merit.

Several factors, considered duly proven in the record, lead to this conclusion. First, there is no trust relationship between the United States and Marie Ducheneaux. Whatever the motive for placing ownership of the purchased lands, the United States is not shown by the evidence to

be a party to the transaction and there is no evidence of any consent by the government to hold any interest for the benefit of Marie Ducheneaux. If Marie permitted this situation to continue up to the death of the Testator, she is then the subject of a mis-placed trust rather than any constructive or resulting trust. She has failed to produce any evidence that Testator undertook any obligation to her to preserve her interest in the properties. Secondly, the only word we have from the Testator is his written word in the will whereby he specifically disinherits his wife, Marie. This is actually evidence contrary to Marie's assertion that Testator had an understanding she owned an interest in the trust properties. If there were, he denied it by testamentary act. Thirdly, the law of the case is simple. *Tooahnippah v. Hickel*, 397 U.S. 599, (1970) clearly and unequivocally limits the authority of the Secretary of the Interior, where it is determined the testamentary act is voluntary, free from duress, undue influence or mistake. The Secretary must approve the will, though it be unfair or improvident, and may not substitute his judgment for that of the testator. Here the testator grants his trust estate to his nephews and nieces. Fourthly, the stipulation agreement establishing testator's obligation to pay support has the appearance at least of defining the relative positions of the parties to the marital separation. It is not considered here as definitive of all obligations of testator in his role as husband but since the separation was complete and permanent it was a significant time to assert whatever claim of right she had in the trust property. The claim of Marie Ducheneaux is denied.

All other claims were considered in the Tribal Court and shall receive no treatment here.

That the trust lands of the decedent are situated on the Cheyenne River Indian Reservation in South Dakota. The Indians of this Reservation have voted to accept the provisions of the act of June 18, 1934, 48 Stat. 984, 25 USC Sec. 464, which provides that no devise to a person not

an heir at law of the testator or a member of the Tribe having jurisdiction over the land devised may be approved. The devisees named in the will of the decedent herein are found to be duly enrolled members of the Cheyenne River Reservation, and they are eligible to take the trust lands of the decedent devised to them as such enrollees.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 2 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 43 CFR Part 4, I hereby order, adjudge, and declare that:

The last will and testament of the testator dated January 24, 1980, be and the same is hereby approved.

The Superintendent of the Cheyenne River Indian Reservation in South Dakota, shall cause distribution to be made of the trust estate of the testator in accordance with his last will and testament, dated January 24, 1980, and with this order; each devisee and heir shall receive any cash accruing after the death of the testator from their devised interests as follows:

TO: JUNE ELLEN DUCHENEAUX LEDBETTER, CRU-7357, born 3/1/47, Niece LILLIAN LYNN DUCHENEAUX, CRU-7456, born 6/20/48, Niece RIA ELAINE DUCHENEAUX SEABOY, CRU-7537, born 6/24/49, Niece ORVILLE ROLLAND DUCHENEAUX, CRU-7573, born 10/6/50, Nephew LARRY DOUGLAS DUCHENEAUX, CRU-7789, born 6/28/53, Nephew DEANNA MARIE DUCHENEAUX MULLOY, CRU-8653, born 2/1/59, Niece MARLENE KAY DUCHENEAUX, CRU-9391, born 7/15/62, Niece

EACH an undivided 1/7 interest in all of the trust or restricted property owned by the testator at the time of his death.

Done at Billings, Montana, on August 4, 1983.

/s/GARRY V. FISHER
GARY V. FISHER
Administrative Law Judge

EXHIBIT 5

INVENTORY AND APPRAISEMENT OF TRUST PROPERTY BY DOUGLAS LEONARD DUCHENEAUX, DECEASED CHEYENNE RIVER ALLOTTED 3482, OF THE CHEYENNE RIVER RESERVATION IN SOUTH DAKOTA.

According to the records of the Cheyenne River Agency, Eagle Butte, South Dakota, Douglas Leonard Ducheneaux, CR-3482, at the time of his death was possessed of trust property or interest herein on the Cheyenne River Reservation in South Dakota.

BLACK HILLS MERIDIAN

		SHARE	VALUE
CR-3482	Conveyed to Cheyenne River Sioux Tribe		
Own Allotment	August 15, 1957		
	Twp. 17 N., Rge. 29 E.		
	Sec. 31 - Lots 1, 2, $E^1/_2NW^1/_4$,		
	Lots 3, 4, $E^1/_2SW^1/_4$,		
	Twp. 16 N., Rge. 29 E.		
	Sec. 4 - Lots 3, 4, $E^1/_2NW^1/_4$,		
	Sec. 5 - Lots 3, 4, $SW^1/_4NW^1/_4$,		
	$W^1/_2SE^1/_4NW^1/_4$,		
	$E^1/_2SE^1/_4NW^1/_4$,		
	Sec. 7 - $W^1/_2SE^1/_4$, $NE^1/_4SE^1/_4$, $N^1/_2SE^1/_4SE^1/_4$, $SE^1/_4SE^1/_4NE^1/_4$,	1/1 acquired thru exchange	
	Containing 794.76 acres, more or less	1/1 Aggreg.	$47,685.60
	Estimated @ 7,685.60		
CR-4750	Twp. 16 N., Rge. 29 E.	$^1/_2$ direct thru	
Phillip B.	Sec. 8 - $NE^1/_4$,	purchase	
Ducheneaux	Containing 160.00 acres,	$^1/_2$ approved	
	more or less.	November 14, 1963	
	50% MINERALS ONLY	1/2 Aggreg.	NOMINAL

CR-5566 Edwina Joy Ducheneaux	Twp. 16 N. Rge. 29 E. Sec. 6 - $SE^{1}/_{4}NW^{1}/_{4}$, Containing 144.81 acres, more or less. Estimated @ $9,600.00.	1/1 thru purchase dated November 16, 1966 1/1 Aggreg. $9,600.00
CR-516 Phillip Mound 82101-41	Twp. 15 N., Rge. 25 E. Sec. 1 - $SE^{1}/_{4}$, Containing 160.00 acres, more or less. MINERALS ONLY	1/1 thru purchase May 17, 1968 1/1 Aggreg. NOMINAL
X-1143 May Horn Earring C-3-64	Twp. 16 N., Rge. 28 E. Sec. 21 - $N^{1}/_{2}NW^{1}/_{4}$, $SW^{1}/_{4}NW^{1}/_{4}$, $^{1}/_{2}W^{1}/_{2}SE^{1}/_{4}NW^{1}/_{4}$, Containing 130.00 acres, more or less. MINERALS ONLY	1/1 thru purchase May 17, 1968 1/1 Aggreg. NOMINAL
	TOTAL ESTIMATED VALUE OF DECEDENT'S INHERITED INTERESTS –	$57,285.60

An investigation as to the value of minerals on this reservation reveals that there is no supportable mineral market. In view thereof, it is our judgement that any purported value of mineral is highly speculative and nominal in amount, therefore, no separable value has been accorded to the mineral interest in this inventory and appraisement.

I certify that the foregoing is an accurate inventory according to the records of the Cheyenne River Agency, Eagle Butte, South Dakota, of the trust or restrictd property or interests therein owned by Douglas Leonard Ducheneaux, CR-3482, at the time of his death. The value shown in this inventory may be by law to be collected and it may not necessarily represent the present market value of the property. Further investigation of values should be made before entering into any negotiations involving this property.

Dated this 23rd day of April, 1980, at Cheyenne River Agency, Eagle Butte, South Dakota.

/s/ J. C. BREWER, JR.
J. C. BREWER, JR.
Realty Officer

EXHIBIT 5-A

INVENTORY AND APPRIASEMENT OF TRUST PROPERTY OWNED BY DOUGLAS LEONARD DUCHENEAUX, DECEASED CHEYENNE RIVER ALLOTTED 3482, OF THE CHEYENNE RIVER RESERVATION IN SOUTH DAKOTA.

According to the records of the Cheyenne River Agency, Eagle Butte, South Dakota, Douglas Leonard Ducheneaux, CR-3482, at the time of his death was possessed of trust property or interest herein on the Cheyenne River Reservation in South Dakota.

		BLACK HILLS MERIDIAN	
		SHARE	VALUE
CR-5566 Edwina Joy Ducheneaux	Twp. 16 N., Rge. 29 E. Sec. 6 - Lots 3, 4, 5, Containing 104.81 acres, more or less	1/1 thru purchase dated November 16, — 1966 1/1 Aggreg.	

Dated this 11th day of July, 1980, at Cheyenne River Agency, Eagle Butte, South Dakota 57625.

/s/ J. C. BREWER, JR.
J. C. BREWER, JR.
Realty Officer

NOTE: TO BE ADDED TO THE INVENTORY OF DOUGLAS LEONARD DUCHENEAUX, CR-3482.

APPENDIX D

United States Department of the Interior

OFFICE OF HEARING AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

ESTATE OF DOUGLAS LEONARD DUCHENEAUX

IBIA 84-4 Decided May 31, 1985

Appeal from an order denying rehearing issued in Indian Probate IP BI 467C 80 on October 3, 1983, by Administrative Law Judge Keith L. Burrowes.

Affirmed.

1. Indian Probate: Claim Against Estate: Generally—Indian Probate: Divorce: State Court Decree: Alimony—Indian Probate: State Law: Generally

   Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

2. Indian Probate: Inventory: Property Erroneously Excluded or Included

   Departmental regulations found in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's inventory of Indian trust assets during the probate of a deceased Indian's estate.

3. Indian Probate: Resulting Trust

   Resulting purchase money trusts in Indian trust land may not be claimed by persons to whom the Federal Government owes no trust responsibility.

APPEARANCES: Newell E. Krause, Esq., Mobridge, South Dakota, for appellant; Krista Clark, Esq., Eagle

Butte, South Dakota, for appellees; Michael Cox, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., at the request of the Board. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On November 8, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Marie Ducheneaux (appellant), seeking review of an October 3, 1983, order denying rehearing issued in the estate of Douglas Leonard Ducheneaux (decedent) by Administrative Law Judge Keith L. Burrowes. The order denying rehearing let stand an August 4, 1983, order approving decedent's will issued by Administrative Law Judge Garry V. Fisher. For the reasons discussed below, the Board affirms the order denying rehearing.

Background

Decedent, Allottee 3482 of the Cheyenne River Indian Reservation in South Dakota, died April 11, 1980, at the age of 65. A hearing to probate his Indian trust estate was held on July 23 and October 29, 1980, before Judge Fisher. A document executed on January 24, 1980, and alleged to be decedent's last will and testament was introduced at the hearing.

Testimony at the hearing revealed that decedent and appellant, a non-Indian, were married on February 3, 1948. Although the couple separated in 1971 and divorce proceedings were commenced, a divorce was never granted and they remained married until decedent died. The separation however, was complete. Court orders were entered against decedent in 1972 and 1974, as a result of which he was obligated to pay appellant $150 per month for appellant's support.

Decedent's will expressly excluded appellant and left his entire estate to June Ellen Ducheneaux Ledbetter, CRU-

7357; Lillian Lynn Ducheneaux, CRU-7456; Ria Elaine Ducheneaux Seaboy, CRU-7537; Orville Rolland Ducheneaux, CRU-7473; Larry Douglas Ducheneaux, CRU-7789; Deanna Marie Ducheneaux Mulloy, CRU-8653; and Marlene Kay Ducheneaux, CRU-9391 (appellees). Appellees are the children of decedent's half-brother, Allen Theodore (Ted) Ducheneaux.

Judge Fisher found that there was no evidence that decedent was of unsound mind or was acting under undue influence when his will was executed. Accordingly, he approved the will and ordered distribution of decedent's Indian trust estate in accordance with the will's provisions. In reaching this decision, Judge Fisher found that the court orders requiring decedent to make support payments to appellant did not create a claim against decedent's estate for continued payments after his death, and that appellant's claim of an interest in decedent's trust estate on the grounds of a resulting purchase money trust was without merit.

Appellant sought reveiw of this decision. By order dated September 20, 1983, the Board docketed and dismissed the appeal as premature. *Estate of Douglas Leonard Ducheneaux*, 12 IBIA 1 (1983). Appellant thereafter filed a petition for rehearing with the Administrative Law Judge under 43 CFR 4.241. Because Judge Fisher had retired, the petition was considered by Judge Burrowes, who denied rehearing on October 3, 1983.

The present appeal was received by the Board on November 8, 1983. Briefs on appeal were filed by both parties. In addition, the Board requested briefing by the Office of the Solicitor, U.S. Department of the Interior, on the question of recognition of resulting purchase money trusts in Indian trust property. The Solicitor's brief was received on September 28, 1984. Both parties filed responses to the Solicitor's brief.

Discussion and Conclusions

On appeal, appellant raises the same two issues that were raised before Judge Fisher. First, appellant argues that she should have been awarded a monthly support payment of $150. Second, appellant contends that, except for the quarter section that constituted decedent's original allotment, she is entitled to a one-half interest in all of the trust property in decedent's estate because the property was acquired through their joint efforts.

[1] In order to prevail on her first claim, appellant must show that decedent's obligation to make a monthly support payment to her survived his death. The Board follows the general rule in domestic relations cases that the law of the jurisdiction in which a relationship was created governs the rights and obligations arising from the relationship. *Cf. Estate of Henry Frank Racine*, 13 IBIA 69 (1985); *Estate of Richard Doyle Two Bulls*, 11 IBIA 77 (1983). Thus, if no other jurisdiction is involved, the law of the jurisdiction granting a divorce or separate maintenance determines whether alimony or support payments survive the payor's death. This question then normally will be decided by state or tribal law.

Here, support payments were ordered by the South Dakota courts. In *Tyler v. Tyler*, 233 N.W.2d 804, 805 (S.D. 1975), the South Dakota Supreme Court upheld a lower court decision "granting alimony of $400 per month for plaintiff's lifetime unless she remarrie[d], which shall be an obligation or charge against appellant's estate." [In a footnote, the Court cited 24 AmJur.2d, Divorce and Separation, § 642, in finding that "[n]o issue is raised regarding termination of alimony upon the death of the husband. In other states there is a difference of opinion."] No more recent South Dakota case discussing this issue has been found.

In considering the law of the State of South Dakota, the Board notes that if alimony or separate maintenance

payments normally survived the death of the payor in that jurisdiction, it would not be necessary for the courts to include a survival of the cause of action clause in the order requiring payments. The Board concludes, therefore, that in South Dakota, alimony or separate maintenance payments will survive the payor's death only when so stated in the decree, as in *Tyler*, *supra*.

The Board has reviewed the two court orders requiring support payments by decedent in this case. The 1972 order initially establishing payments concerned temporary support pending the completion of the divorce proceedings. The 1974 order dismissed a complaint for nonsupport against decedent on his representation that he would continue the payments. Because there is no evidence in either order that the court intended to make these payments an obligation against decedent's estate, we hold that appellant is not entitled to payment from the estate.

The second question raised in this appeal is whether a portion of decedent's Indian trust estate should be found to constitute the separate property of appellant under a resulting purchase money trust theory. Appellant asserts that decedent would not have acquired this property without her efforts, and that the property was placed in decedent's name for the sole reason that it would thus have the status of Indian trust land. In his August 4, 1983, order, Judge Fisher found that he did not have jurisdiction to determine whether this property was improperly listed by BIA as an asset of decedent's estate. Alternatively, in the event that the Board determined he did have jurisdiction, Judge Fisher found appellant's claim to be without merit.

The Board first considers Judge Fisher's conclusion that he lacked authority to determine appellant's claim. In response to the Board's June 21, 1984, order, the Solicitor filed a brief on the issue of the recognition of resulting purchase money trusts in Indian trust property. That brief

notes that although such trusts have not been specifically addressed before,[1] there appears to be no reason why they should not be recognized under appropriate circumstances. The brief further states that Administrative Law Judges are better equipped than BIA officials to consider the mixed questions of fact and law involved in the recognition of such resulting trusts. The solicitor believes that 43 CFR 4.273(a)[2] provides sufficient authority for Administrative Law Judges to consider this type of question in the context of a probate proceeding. At present, section 4.273, dealing with improperly included property, and its related provision, section 4.272, dealing with omitted property, are primarily employed as remedies for administrative errors discovered after the conclusion of a probate proceeding.

Under 43 CFR 4.1(b)(2) and 4.330, the Board has authority to review administrative decisions of BIA officials made under 25 CFR Chapter I. Maintaining title records to Indian trust property is an administrative responsibility assigned to BIA under 25 CFR Part 150. Therefore, questions arising from the maintenance of such records can be reviewed by the Board.

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[1] In the *Estate of Jack R. Yellow Bird or Steele*, IP BI 600B 80, IP BI 549C 78, Administrative Law Judge Daniel S. Boos found that the decedent's surviving Indian spouse owned one-half (1/2) interest in lands held in the decedent's name. Although Judge Boos found "that without the money [the surviving spouse deposited] in the personal [bank] account to sustain the day-to-day living of the family there would have been little, if any, money in the ranch account available for land purchase," he characterized the interest of the surviving spouse as a joint tenancy rather than a resulting purchase money trust. *Estate of Yellow Bird* , Order of Aug. 22, 1980, at 2-3.

[2] Section 4.273 (a) states:

"When subsequent to a decision under § 4.240 or § 4.296, it is found that property has been improperly included in the inventory of an estate, the inventory shall be modified to eliminate such property. A petition for modification may be filed by the Superintendent of the Agency where the property is located, or by any party in interest."

The customary administrative appeal process is set forth in 25 CFR Part 2: The agency Superintendent undertakes an action or issues a decision which is then subject to an appeal to the Area Director, whose decision in turn is subject to an appeal to the Deputy Assistant Secretary—Indian Affairs (Operations),[3] whose decision may then be reviewed by the Board of Indian Appeals. If the Board determines that there is a genuine dispute of material fact, under 43 CFR 4.337(a) it can refer the matter to an Administrative Law Judge for an evidentiary hearing and recommended decision. Under 43 CFR 4.202 the Indian Probate Administrative Law Judges have authority to "hold hearings and issue recommended decisions in matters referred to them by the Board in the Board's consideration of appeals from administrative actions of the Bureau of Indian Affairs."

The Board recently followed this procedure in the *Estate of Stella Valandry Williams*, 13 IBIA 35 (1984), *on reconsideration*, 13 IBIA 46 (1984). In *Williams* the Administrative Law Judge held a probate hearing in which the estate inventory was challenged. The Judge held that he had no jurisdiction to consider that challenge. This order was appealed to the Board, which referred the case to BIA for an analysis of the title status by the agency Superintendent. The Board noted that any appeal from the Superintendent's decision was subject to review by the Area Director and Deputy Assistant Secretary under the procedure established in 25 CFR Part 2. Although *Williams* was recently resolved through settlement, it was quite possible that after review by the Deputy Assistant Secretary, the Board might still have been required to refer the matter for an evidentiary hearing. *Estate of Stella*

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[3] The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

Valandry Williams, 13 IBIA 148 (1985). Obviously, this procedure results in an extremely protracted, confusing, and convoluted proceeding.

[2] Procedurally, in light of the Solicitor's position that Administrative Law Judges are better equipped than BIA officials to decide this type of issue, the Department's trust responsibility to those Indians who are involved in disputes over a decedent's trust estate, and the general rule encouraging the conservation of judicial resources, the Board holds that the existing regulations suffice to allow consideration of alleged legal errors in BIA's inventory of estate assets during a probate proceeding.[4] Because it is inconceivable that a challenge to an estate inventory would not involve a genuine question of material fact, the Board hereby issues a standing order under 43 CFR 4.337(a) routinely referring to the Administrative Law Judge handling an Indian probate proceeding any question concerning equitable title to the assets listed in the inventory of a decedent's trust estate prepared by BIA, whenever that issue is raised while the case is pending before the Administrative Law Judge.

In accordance with 43 CFR 4.311(c), BIA is an interested party in any case challenging an estate inventory. The Administrative Law Judge shall inform the appropriate agency Superintendent, Area Director, and the Deputy Assistant Secretary—Indian Affairs (Operations) of the fact that a dispute over an estate inventory has arisen, in order

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[4] The procedure subsequently established in this opinion is not intended to interfere with the procedures under 25 CFR Part 150 and 43 CFR 4.336 and 4.377 under which modifications to a decedent's estate may be made by BIA and/or the Administrative Law Judges in the event of administrative errors. The procedure established here applies only in those probate cases in which a legal claim is made by a person or persons to trust property titled to another person. The claim may be either that trust property titled to the decedent should have been titled to another, or that trust property titled to another should have been titled to the decedent.

to allow full consideration of the issue and participation in the case by the BIA officials listed in 25 CFR Part 2.[5] The Administrative Law Judge shall take evidence concerning the trust inventory during the regular hearing or hearings held in the estate and shall include in the order concluding the probate proceeding a recommended decision on the disputed issues raised concerning the inventory.

If any party objects to the recommended decision, in accordance with 43 CFR 4.310(d)(1) the 30-day period for filing exceptions to the recommended decision, set forth in 43 CFR 4.339, and the requirement for the submission of the record to the Board, set forth in 43 CFR 4.338(a), are extended to coincide with the time for filing a notice of appeal with the Board under the procedures established in CFR 4.241 and 4.320. The effect of this extension is that exceptions to the recommended decision will be treated in the same manner as objections to the order determining heirs and approving or disapproving a will. If no party objects to the recommended decision, that decision shall constitute the decision of the Board under 43 CFR 4.340.

[3] Judge Fisher alternatively found appellant's claim to a purchase money resulting trust was without merit. The Board has carefully considered arguments for and against the recognition of resulting purchase money trusts in Indian trust land. Indian trust status is a unique concept in property law, and is intended for the benefit of Native Americans. In some cases, however, such as through marriage, non-Indians may indirectly benefit from the special advantages of this form of property ownership. As Judge Fisher noted in his order approving will, at page 2, appellant "cannot claim a trust relationship with the United

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[5] In order to further ensure that the Deputy Assistant Secretary is aware of this decision and procedure, a copy is being sent to him. Should he have any objection to this procedure, the Board will entertain a petition for reconsideration from the Deputy Assistant Secretary, filed in accordance with the provisions of 43 CFR 4.315.

States, nor claim an obligation flowing from the United States to administer her claim interest in the lands * * * [Furthermore,] the United States is not shown by the evidence to be a party to the transaction and there is no evidence of any consent by the government to hold any interest for the benefit of [appellant]." Under the circumstances presented here, the Federal Government owes no trust responsibility to, and cannot hold an interest in land in trust for, appellant. *Bailess v. Paukune*, 344 U.S. 171 (1952); *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Olka. 1966); *Estate of Louise Amiotte Lajtay*, 12 IBIA 229 (1984); *Estate of Dana A. Knight*, 9 IBIA 82, 88 I.D. 987 (1981). For these reasons, the Board concludes that a resulting purchase money trust in Indian trust land cannot be claimed by persons to whom the Federal Government owes no trust responsibility.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 3, 1983, order of Administrative Law Judge Keith L. Burrowes is affirmed.

/s/ JERRY MUSKRAT
JERRY MUSKRAT
Administrative
Judge

We concur:

/s/ BERNARD V. PARRETTE
BERNARD V. PARRETTE
Chief Administrative Judge

/s/ ANNE POINDEXTER LEWIS
ANNE POINDEXTER LEWIS
Administrative Judge

No. 87-1732

In The

Supreme Court of the United States

October Term, 1987

MARIE DUCHENEAUX,

v. *Petitioner,*

SECRETARY OF THE INTERIOR
OF THE UNITED STATES,

Respondent.

JUNE ELLEN DUCHENEAUX LEDBETTER, LILLIAN LYNN DUCHENEAUX, RIA ELAINE DUCHENEAUX SEABOY, ORVILLE ROLLAND DUCHENEAUX, LARRY DOUGLAS DUCHENEAUX, DEANNE DUCHENEAUX MULLOY, ALLEN THEODORE DUCHENEAUX, MARLENE KAY DUCHENEAUX, SUPERINTENDENT OF CHEYENNE RIVER AGENCY AND UNITED STATES BUREAU OF INDIAN AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JUNE ELLEN DUCHENEAUX LEDBETTER, LILLIAN LYNN DUCHENEAUX, RIA ELAINE DUCHENEAUX SEABOY, ORVILLE ROLLAND DUCHENEAUX, LARRY DOUGLAS DUCHENEAUX, DEANNE DUCHENEAUX MULLOY, ALLEN THEODORE DUCHENEAUX, AND MARLENE KAY DUCHENEAUX

KRISTA H. CLARK
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Dakota Plains Legal Services
P.O. Box 727
Mission, S.D. 57555
(605) 856-4444

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district court did not have jurisdiction under the Administrative Procedure Act, (APA) 5 U.S.C. §702, to divest the United States of title to land held in trust for Indians because the APA is preempted by the Quiet Title Act, 28 U.S.C. §2409(a)?

2. Whether the court of appeals erred in holding that the district court could not override the provisions of an Indian's validly executed will which had been approved by the Secretary of the Interior?

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OPINIONS BELOW

The opinion of the court of appeals' panel (Pet.App. 1a-12a) is reported at 837 F.2d 340. The opinion of the district court (Pet. App. 13a-27a) is reported at 645 F.Supp. 930.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1988. The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Douglas Ducheneaux, hereinafter Ducheneaux, a member of the Cheyenne River Sioux Tribe of South Dakota, married Petitioner, Marie Snoble, a non-Indian, in 1948. The couple spent most of their married life on the Cheyenne River Reservation where Ducheneaux owned, before the marriage, 160 acres of allotted land which was held in trust for him by the United States government. Ducheneaux and Petitioner lived as man and wife until 1971 when they separated and Petitioner moved off the reservation. During the marriage Ducheneaux acquired five quarter sections of Indian trust land from other members of the Cheyenne River Sioux Tribe and these interests were held in trust for him by the United States. Pet. App. 28a, 31a.

After Ducheneaux and Petitioner separated Ducheneaux began a divorce proceeding in the circuit court of South Dakota. The divorce was never finalized because Petitioner claimed she had a right to one-half of Ducheneaux's interest in the five quarter sections of trust land on the reservation and he refused to acknowledge this claim. *Id.* at 15a. Petitioner later sued Ducheneaux in the federal district court in South Dakota, seeking to have the land divided, but the case was dismissed when the court held it did not have jurisdiction to partition the land. *Id.* at 16a.

Ducheneaux and Petitioner remained separated until Ducheneaux's death in 1980. At his death Ducheneaux left a will in which he designated that his entire trust estate should be divided between seven neices and nephews, the children of his half brother, all enrolled members of the Cheyenne River Sioux Tribe.

When Ducheneaux's trust estate was probated by the Secretary of the Interior, Petitioner filed a claim to one-half of the land Ducheneaux had acquired while the couple were married. She claimed a right to one-half of the property because, she alleged, she had contributed equally in the ranching operation during the marriage. She characterized this interest as a resulting or constructive trust. *Id.* at 3a. Ducheneaux's heirs disputed Petitioner's claim that she had contributed equally in the acquisition of the trust property purchased during the marriage.

The Administrative Law Judge (ALJ) of the Department of the Interior approved Ducheneaux's will, citing *Tooahnippah v. Hickel*, 397 U.S. 598 (1970),

and held that Ducheneaux had executed the will voluntarily, without duress, undue influence or mistake. The ALJ also found that Ducheneaux intended to disinherit his estranged wife. Finally, the ALJ held that the United States owed no trust responsibility to Petitioner because she is a non-Indian and could not, therefore, claim any interest in Ducheneax's trust estate. Pet. App. 28a-33a.

Petitioner appealed the ALJ's decision to the Interior Board of Indian Appeals (IBIA). The IBIA upheld the decision of the ALJ, finding that "a resulting purchase money trust in Indian trust land cannot be claimed by persons to whom the federal government owes no trust responsibility" (*id.* at 47a). The IBIA also held that "as part of the Department's trust responsibility to those *Indians* who are involved in disputes over a decedent's trust estate" (*id.* at 45a, emphasis added), under 43 C.F.R 4.273(a), the ALJ possessed the authority to consider "alleged legal error in the BIA's inventory of estate assets during a probate proceeding" (*ibid.*).

Petitioner then filed suit in the district court, alleging jurisdiction under 5 U.S.C. §702, the Administrative Procedure Act (APA). Applying the scope of review set out at 5 U.S.C. §706, the district court reversed the decision of the Secretary of the Interior, holding that the decision was "contrary to law, unsupported by any substantial evidence, and is arbitrary and capricious" (Pet. App. 26a). The district court based its decision on a theory of "spousal contribution" (*id.* at 22a-26a), finding that the evidence in the record supported Petitioner's claim that she had contributed equally to the

acquisition of the property during the marriage. The district court's decision was based primarily on its reading of an estate taxation case, *Craig v. United States*, 451 F.Supp. 373 (D.S.D. 1978), involving non-Indians, and on a case involving an Indian couple divorced in a tribal court where the court divided the trust land acquired during the marriage between the parties, *Conroy v. Frizzell*, 429 F.Supp. 918 (D.S.D.) *affirmed*, 575 F.2d 175 (8th Cir. 1978). Pet. App. 23a-24a. The district court found that because one-half of the property acquired during the marriage was Petitioner's, Ducheneaux had no authority to will it to other family members. *Id.* at 25a.

A panel of the court of appeals, without dissent, reversed the district court's decision, noting that although the district court had "persuasive equitable reasons" for ruling as it did, that the court erred by not applying the Quiet Title Act (QTA), 28 U.S.C. §2409(a), and the cases interpreting the QTA, and by substituting its wishes for Ducheneaux's in overriding his valid will. Pet. App. at 2a-12a. Citing *United States v. Mottaz*, 106 S.Ct. 2224 (1986), the court of appeals observed that "The QTA prohibits a party from suing the United States when the purpose of the suit is to challenge the goverment's title to land held in trust for Indians" (Pet. App. 4a). The panel found that the purpose of Petitioner's suit against the United States was to challenge the government's title to Indian trust land and, therefore, the QTA prohibited the district court from having jurisdiction in the case. *Id.* at 5a.

The panel also found that Petitioner's claim that the district court had jurisdiction to hear her appeal

under the APA was invalid, following the reasoning in *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273 (1983). In *Block*, the court said, "the Supreme Court held that the QTA is the only means by which adverse claimants can challenge the United States' title to real property" (Pet. App. 5a). The reasoning in *Block*, the panel observed, had been followed by the Eighth Circuit in *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985) and by the Eleventh Circuit in *State of Florida v. United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985) *cert. denied*, 475 U.S. 1011 (1986). Pet. App. 5a-7a. The Court also found that Petitioner's claim that *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978), mandated that the Eighth Circuit uphold the district court's decision to divide the trust land acquired during the marriage was distinguishable because in *Conroy*, where both husband and wife were enrolled Indians, the issue of whether a party could sue the United States in order to divest the government of its title to trust land had not arisen. Pet. App. 8a-9a.

The district court's holding that it had the authority to overrule Ducheneaux's will, which had been found to be a rational testamentary disposition by the Secretary, was held by the panel to be contrary to two decisions of this Court, *Blanset v. Cardin*, 256 U.S. 319 (1921), and *Tooahnippah v. Hickel*, 397 U.S. 598 (1970). Pet. App. 9a-11a. Both *Blanset* and *Tooahnippah*, the panel observed, dealt with the power of an Indian to dispose of his or her trust estate by will under 25 U.S.C. §373. Unless the testator's will is irrational, this Court said in *Tooahnippah*, the Secretary does not have

the authority to "substitute his preference for that of an Indian testator" (379 U.S. at 608). The panel pointed out that the Ninth Circuit in *Akers v. Morton*, 499 F.2d 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975), had followed *Blanset* and *Tooahnippah* in holding that state dower law is not applicable when the Secretary had found the decedent's will to be rational and not technically deficient. Pet. App. 11a.

ARGUMENT

Petitioner argues to this Court that the court of appeals erroneously applied the QTA to the facts of this case and, second, that the court of appeals misunderstood the district court's opinion in holding that the lower court could not override Ducheneaux's valid will. Because Petitioner's arguments and authority do not show that the court of appeals' decision is in conflict with any decision of this Court or any other court of appeals, review by this court is not appropriate.

1. The QTA provides, in relevant part, that:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands* . . .

28 U.S.C. §2409a (emphasis added).

This Court has said in two decisions, *United States v. Mottaz*, 106 S.Ct. 2224 (1986), and *Block v. North Dakota ex rel. Board of University and School Lands*,

416 U.S. 273 (1983), that the QTA does not waive the United States immunity from suit when the land in question is trust or restricted Indian lands. Pet. App. 5a. In *Mottaz* this Court found that:

> "[The QTA] operates solely to retain the United States immunity from suit by third parties challenging the United States' title to land held in trust for Indians. Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity."

106 S.Ct. at 2230.

In *Block* this Court addressed the exact issue raised by Petitioner here: does the APA waiver of sovereign immunity of the United States allow parties to sue the government when the dispute concerns the title to Indian trust land? This Court, unequiviocally, said "no".

> "We hold that Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 416 U.S. at 286.

In explaining why the language in the QTA does not waive the government's immunity from suit when the challenge is to the United States title to land held in trust for Indians, this Court observed in *Mottaz* that:

> "In urging that such an exemption be included in the Quiet Title Act, the Solicitor for the Department of the Interior noted that excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent abridgement of 'solemn obligations' and 'specific commitments' that the Federal

> Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent. *See* H.R. Report No. 92-1559, p. 13 (1972) U.S. Code Cong. and Admin. News 1972, p. 4547."

106 S.Ct. at 2230 n. 6.

This Court's holding that the QTA does not waive the United States' immunity from suit when a third party seeks to divest the United States of its title to Indian trust land was followed by the Eighth Circuit both in this case and in *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985); by the Eleventh Circuit in *State of Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), and by the Ninth Circuit in *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987) and in *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987).

In *Spaeth*, as the panel noted, the Eighth Circuit held that the QTA barred an action to adjudicate a disputed title to Indian real property in which the United States did not claim an interest. The court found that §702 of the APA did not waive the United States' immunity from suit because the language of §702 indicated it was preempted by the QTA's express provisions which forbid attempts to divest the United States of its title to trust land. 957 F.2d at 942.

In *State of Florida*, also relied upon by the court of appeals, Florida, too, was trying to utilize the APA to circumvent the government's immunity from suit under

the QTA when title to Indian land was being challenged. Relying on *Block*, the Eleventh Circuit rejected the state's argument, holding that "[T]he QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property." 768 F.2d at 1254.

In the Ninth Circuit, in *Wildman*, the owners of property which adjoined a river tried to quiet title to land located in a riverstream bed. Even though the United States had only a colorable claim to the land as Indian trust land, the court held that that was sufficient to invoke the government's immunity from suit under the QTA. 827 F.2d at 1309.

Most recently, in *Metropolitan Water District of Southern California v. United States*, the United States was again sued under the APA when the plaintiffs sought a decree establishing reservation boundaries. The court held that even though the suit was not one where a third party was attempting to quiet title to Indian land for itself, the QTA still applied because the effect of a successful action would be to quiet title in others. 830 F.2d at 143.

This Court and the Eighth, Ninth and Eleventh Circuits have uniformly held that the QTA preempts application of the APA in suits challenging the United States' title to Indian trust land and, further, that the QTA itself expressly forbids suits seeking to divest the United States or its title to Indian trust land. Thus, when Petitioner sued the United States in the district court seeking an order which would have deprived the government of its title to the land it held in trust for

Ducheneaux, the court of appeals was correct in holding that the district court was without jurisdiction to hear her complaint.

Petitioner argues, without citing any authority to support her claim, that the QTA is not applicable to this case and that the cases cited by the circuit court are distinguishable because the facts and parties are different. Pet. 6. Petitioner's unsupported assertion that the QTA does not apply in this case, when the facts, cited *supra*, clearly show that she seeks to divest the United States of its title to Indian trust land, has no merit.

Petitioner also argues, relying on a brief filed by the Department of the Interior, Office of the Solicitor, to the IBIA, that the Secretary had a duty to modify the inventory in Ducheneaux's estate, under 43 C.F.R. §4.273, based on the evidence she submitted showing her contribution to the acquisition of trust lands during the marriage. Pet. 5-6. The IBIA did in fact incorporate the Solicitor's views regarding challenges to the inventory in a decedent's trust estate in its opinion, providing for such challenges under 43 C.F.R. §4.273. Pet. App. 45a. The IBIA, however, made clear that the kinds of challenge it would consider concerned "those *Indians* who are involved in disputes over a decedent's trust estate" (Pet. App. 45a), and not challenges by non-Indians, "to whom the government owes no trust responsibility" (Pet. App. 47a). The IBIA view regarding challenges to estate inventories, although not specifically mentioned by the court of appeals, is entirely consistent with the opinions of this Court and other courts of appeals in that it allows the Secretary to

settle disputes between Indians over title to Indian trust land but does not purport to allow non-Indians to challenge the United States' title to Indian trust land, which is forbidden by the QTA.

Petitioner also argues that the Eighth Circuit's decision in *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978), requires that she be awarded one-half of the trust land acquired during the marriage, because in *Conroy* the court upheld a tribal court decision which ordered a division of marital property, including Indian trust land, between Indian spouses. Pet. 7. The court of appeals' response to Petitioner's reliance on *Conroy* was correct. The significant distinction between *Conroy* and the facts of this case, as the panel noted, is that in *Conroy* the Eighth Circuit was recognizing the validity of a decree of divorce from a tribal court of competent jurisdiction where both parties were members of the Oglala Sioux Tribe, whereas here Petitioner is asking the court to award her, a non-Indian, one-half of the trust land acquired during the marriage. Pet. App. 8a-9a. What Petitioner asks the Court to do is exactly what is prohibited by the QTA, divesting the government of its title to Indian trust land.

Petitioner also alleges that she is being discriminated against on the basis of race, citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), because the Eighth Circuit has held that Indians are allowed to have trust land divided in tribal court based on a spouse's showing that he or she contributed to the acquisition of the property, while Petitioner is not allowed to challenge the title to Indian trust property in Ducheneaux's estate, which she alleges was acquired

jointly during their marriage. Pet. 7. *Bakke* and this case are distinguishable. In *Bakke* this Court invalidated a medical school special admission program because it was found to be inconsistent with Title VII of the Civil Rights Act of 1964 which prohibits discrimination on racial or ethnic grounds in federally assisted programs. The discrimination prohibited by this Court in *Bakke* is not analogous to the Secretary's refusal to award Petitioner a share of Ducheneaux's trust estate, even assuming Petitioner had in fact shown that she contributed equally to the acquisition of the land purchased during the marriage, which the non-federal Respondents do not concede. This Court has held that there are permissible distinctions which may be drawn between Indians and non-Indians, which distinctions include the rules applicable to Indian trust property. In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court said that:

> "On numerous occasions this Court has specifically upheld legislation that singles out Indians for particular and special treatment.
>
> . . . .
>
> This unique legal status is of long standing, (citations omitted) and its sources are diverse.
>
> . . . .
>
> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique legal obligation towards Indians, such legislative judgments will not be disturbed."

Id. at 554-555.

Morton v. Mancari is, in fact, specifically distinguished in *Bakke*, 438 U.S. 304 n. 47.

2. Petitioner also argues that the court of appeals erred when it held that the district court was without authority to override Ducheneaux's validly executed will. Petitioner's argument, essentially, is that the appeals panel should not have characterized the district court's decision as overruling the decedent's intent in his will but, rather, should have described the lower court ruling as simply removing improperly included property from Ducheneaux's estate inventory. Pet. 8. Petitioner's claim is without merit and, as shown by the authority cited *supra*, the district court did not have the authority to order the Secretary to remove Indian trust property from Ducheneaux's estate for the benefit of Petitioner, a non-Indian, because the QTA forbids any attempt to divest the United States of its title to Indian trust land.

The appeals panel was correct in holding that the district court did not have the power to substitute its preference for that of the decedent in the distribution of his trust estate once the Secretary had found that the will was neither technically deficient or irrational, based on this Court's decision in *Blanset v. Cardin*, 256 U.S. 319 (1921), and *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), and on the Ninth Circuit's decision in *Akers v. Morton*, 499 F.2d 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975). Pet. App. 9a-11a.

As the court of appeals noted, the facts of *Blanset* are very similar to those in this case. In *Blanset* a non-Indian spouse sought one-third of his deceased Indian wife's trust estate, when she had specifically disinherited him and had left her estate to her children and grandchildren. This Court held that 25 U.S.C. §373,

which governs the disposition of Indian trust property by will, controlled, thus allowing Indians to dispose of their property free from the law of the state in which they resided.

> "[I]t was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress (25 U.S.C. §373), free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior."

326 U.S. at 326-27.

In 1970, in *Tooahnippah v. Hickel*, (1970), this Court again addressed the question of the extent of an Indian testator's right to disinherit a close relative in favor of more distant relatives. In *Tooahnippah* this Court had to decide whether the Secretary had the authority under 25 U.S.C. §373 to substitute his wishes for that of the testator, when the Secretary felt the decedent had not treated his closest heir fairly. This Court found that:

> ". . . .[N]othing in the statute or its history or purpose . . . vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable'." (Footnote omitted)

397 U.S. at 610.

The *Blanset* and *Tooahnippah* decisions have been followed by the Ninth Circuit, the only other court of

appeals to have been faced with the question of the extent of an Indian testator's authority to dispose of his trust property by will under 25 U.S.C. §373. In *Akers v. Morton*, discussed by the appeals panel in this case, the Ninth Circuit said it was bound to follow this Court's rulings in *Blanset* and *Tooahniopah* and to abide by the requirements of 25 U.S.C. §373, even though it felt the result to be inequitable. 499 F.2d at 47-48. In *Akers* an Indian disinherited his Indian wife of all his interest in trust land in favor of a more distant relative, even though the facts showed her money had been used to purchase the property which had been placed in trust in his name, with the legal title held by the United States. Citing *Tooahnippah*, 397 U.S. at 410, the court said that "The Secretary may disapprove a will only if it is technically deficient or if it is irrational. Where, as in this case, it is rational . . . the Supreme Court has indicated that the Secretary is not free to disapprove the will merely on notions of fairness or equity." *Akers*, 499 F.2d at 47.

Contrary to Petitioner's assertions, *Akers* does not support her claim that she should be awarded one-half of the trust property acquired during the marriage. Petitioner alleges that "Petitioner's claim to an interest in the property was established in the course of the probate of her husband's estate . . . " (Pet. 8). In *Akers* the facts were clear that the disinherited spouse's funds were used to purchase the decedent's trust land, whereas in this case neither the ALJ or the IBIA made such a finding (Pet. App. 31a and 39a-40a), nor did the court of appeals. Pet. App. 3a.

Petitioner also claims that the Ninth Circuit's observation, made in a footnote, that a resulting trust theory was not raised in *Akers*, thus preventing that court from considering whether the restricted land was properly included in Mr. Akers' estate, should have been addressed in this case by the court of appeals. 499 F.2d at 46 n. 1. What is critical to remember about *Akers*, and what Petitioner refuses to acknowledge, is that the disinherited spouse in *Akers* was an Indian, while Petitioner is not. Thus, even if a resulting trust theory had been considered in *Akers*, and if the court had ultimately decided the restricted land should not have been included in Mr. Akers' trust estate, the outcome in *Akers* would have had no effect on the legal title to the land, since it would have remained in trust for Mrs. Akers. Here, as noted *supra*, acquiescence to Petitioner's claim would divest the United States of its title to a portion of Ducheneaux's trust estate. The QTA prohibits this and both the ALJ and the IBIA found that Petitioner's claim to a resulting trust interest in the decedent's trust estate was not permissible because the United States cannot hold restricted property for persons to whom the government owes no trust responsibility. Pet. App. 30a and 47a.

Finally, Petitioner relies on this Court's decision in *Bailess v. Paukune*, 344 U.S. 171 (1952), to support her assertion that the interest in trust land she claims is "dry and passive" and that all the Secretary needs to do is perform the ministerial act of issuing her a fee patent. Pet. 7. Petitioner completely misreads *Bailess v. Paukune*. In *Bailess*, as Petitioner notes, the non-

Indian widow inherited a portion of her Indian husband's estate under his will. Thus, although she had a legal right to title to the land, "the United States had no interest of hers in the land to protect . . . she is not within the class whom Congress sought to protect . . . " (344 U.S. at 173), and a fee patent had to be issued to her. Here, of course, Ducheneaux specifically disinherited Petitioner (Pet. App. 3a, 16) and 25 U.S.C. §373 and this Court's decisions, discussed *supra*, allowed him to do that. Because the decedent in *Bailess* wanted his spouse to have a portion of his trust estate, this Court's discussion about the nature of the United States' duty to a non-Indian spouse and the method of removing land from trust status has nothing to do with this case. The intent of Ducheneaux, which is totally ignored by Petitioner, is the critical distinguishing factor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 87-1732

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARIE DUCHENEAUX, PETITIONER

v.

SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Regulation – Continued:

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Petitioner contends that the court of appeals erred in holding that sovereign immunity barred her suit seeking to overturn the will of her estranged Indian spouse and in holding, in the alternative, that the will should not be overturned on the merits.

1. Petitioner, a non-Indian, is the widow of Douglas Leonard Ducheneaux, an enrolled member of the Cheyenne River Indian Tribe. During their marriage, petitioner and her husband acquired several tracts of property on the Cheyenne River Indian Reservation in Dewey County, South Dakota. Trust patents were issued to petitioner's husband under the General Allotment Act of 1887, 25 U.S.C. (& Supp. IV) 331 *et seq.*[1] Pet. App. 2a-3a,

[1] An Indian can receive a fee patent after 25 years, but the trust status of restricted lands can instead be continued indefinitely. See Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461 *et seq.*

14a-15a & n.1. The United States held legal title to the land, in trust for Mr. Ducheneaux. See 25 U.S.C. 465.

Petitioner and her husband separated in 1971 and remained separated when Mr. Ducheneaux died on April 11, 1980. Mr. Ducheneaux began divorce proceedings in 1971, but the proceedings were never completed. Both the state court hearing the divorce proceeding and a federal court in which petitioner initiated an action in 1972 held that they had no jurisdiction to divide the trust property. Pet. App. 3a, 15a-16a. In his will dated January 24, 1980, Mr. Ducheneaux left his entire estate to his brother's children, expressly disinheriting petitioner (*id.* at 16a-17a n.3). The will was probated by the Bureau of Indian Affairs within the United States Department of the Interior, and an order approving the will and issuing a decree of distribution (*id.* at 28a-37a) was filed pursuant to 43 C.F.R. Pt. 1.[2] Petitioner filed objections to the will, alleging that she was entitled to half of the land acquired during the marriage under a theory that the Secretary of the Interior (Secretary) held the land in constructive trust for her.[3]

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[2] Under tribal law, petitioner received an elective share of Mr. Ducheneaux's personal property amounting to $16,267.13. Under its bylaws incorporating 25 U.S.C. 464, the Cheyenne River Indian Reservation cannot approve devises of restricted land to individuals who are not heirs at law of the testator or members of the Tribe. See *Cultee* v. *United States*, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984).

[3] At the time of petitioner's death, South Dakota had no mandatory widow's share statute, and a husband could therefore disinherit his wife of property to which he held sole title. (Later in 1980 the South Dakota Legislature passed an elective share statute, S.D. Codified Laws Ann. ch. 30-5A (1984).) In addition, South Dakota is not a community property state. Under South Dakota law in effect at the time in question, therefore, even if the land had been held by Mr. Ducheneaux in fee simple rather than by the United States in trust for Mr. Ducheneaux, petitioner would not have been entitled to any of the property.

Petitioner appealed unsuccessfully to the Interior Board of Indian Appeals (IBIA) (Pet. App. 38a-47a). She then filed suit in the United States District Court for the District of South Dakota. The government argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, shows that Congress intended to preserve the United States' sovereign immunity from suit by third parties challenging the United States' title to land held in trust for Indians, and that therefore the district court had no jurisdiction under the QTA or any other statute. Without addressing this argument directly, the court held that "[j]urisdiction is conferred upon the Court by 5 U.S.C. § 706" (Pet. App. 13a). Because the court regarded petitioner as seeking only "a property interest which is rightfully hers" (*id.* at 24a), it directed the Secretary to issue a deed to petitioner for a one-half interest in the decedent's real property as well as an accounting of all rents and profits (*id.* at 27a).

2. The court of appeals reversed (Pet. App. 1a-12a). Citing *United States* v. *Mottaz*, 476 U.S. 834, 842-843 (1986), and *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983), the court reasoned that the QTA by its own terms fails to waive the United States' sovereign immunity for actions challenging the United States' legal title to Indian trust lands, and that the district court could not exercise jurisdiction, as it did, under the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 551 *et seq.*, because the QTA is the only avenue available for claimants to challenge the government's title to real property. Because there is no cause of action under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" (5 U.S.C. (Supp. IV) 702(2)), the court of appeals concluded that the district court was without jurisdiction under the APA and 28 U.S.C. 1331. Pet. App. 4a-9a.

The court of appeals also held that, even if the jurisdictional issue had not been dispositive, the district court's judgment still would have to be reversed because the court lacked the authority to override the terms of the decedent's valid will. The court cited this Court's decisions in *Blanset* v. *Cardin*, 256 U.S. 319, 326 (1921), and *Tooahnippah* v. *Hickel*, 397 U.S. 598, 608-610 (1970). Pet. App. 9a-10a.

3. Petitioner contends that the court of appeals erred in holding that her suit was barred by sovereign immunity and in holding that the district court was without authority to override the express terms of Mr. Ducheneaux's will. The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioner states without explanation (Pet. 6) that the QTA is inapplicable to this case, presumably because of the erroneous belief that petitioner's equitable claim to the trust property is sufficient to divest the United States of its legal title to the trust property. This ignores the well-settled law that the United States has not waived its sovereign immunity to suit when, as in this case, the United States holds legal title to trust or restricted land.

The QTA provides that the United States may be named as a party defendant in a "civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest" (28 U.S.C. 2409a(a)). The QTA, however, expressly does not apply to "trust or restricted Indian lands" (*ibid.*). This exception, the Court has recently observed, "operates * * * to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians" (*United States* v. *Mottaz*, 476 U.S. at 842; see *id.* at 843 & n.6).

In *Block* v. *North Dakota*, 461 U.S. at 286 (footnote omitted), the Court held that "Congress intended the QTA

to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." The Court accordingly rejected the contention that a party could contest the United States' title to real property simply by bringing an action against the responsible federal officer, either under the APA or pursuant to other authority (see *id.* at 280-286 & n.22).[4]

The trust and restricted lands exception to the QTA's waiver of sovereign immunity reflects the government's continuing responsibility for such lands. "By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes." *Florida* v. *United States Dep't of the Interior*, 768 F.2d 1248, 1254 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); see *Block* v. *North Dakota*, 461 U.S. at 285. If the approach urged by petitioner were adopted, however, any claimant could seek title in probate proceedings, circumventing the QTA and rendering "the Indian lands exception to the QTA * * * nugatory" (*ibid.*).

Petitioner cites several cases (Pet. 7) in an attempt to demonstrate the inapplicability of the QTA's exception for suits involving claims to Indian trust lands. The cases, however, offer no support for her argument. In *Conroy* v. *Conroy*, 575 F.2d 175 (8th Cir. 1978), a divorce action between two members of the same Indian tribe, a tribal court

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[4] With respect to the APA, the Court observed in *Block* v. *North Dakota* that the last sentence of 5 U.S.C. (Supp. IV) 702 states that it confers no authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Court concluded that the QTA is an "other statute" within the meaning of this sentence, because the QTA "forbids the relief" sought if the conditions it imposes on Congress's consent to suit are not satisfied (see 461 U.S. at 286 n.22).

divided the trust property between the two spouses. As the court of appeals here stated in distinguishing its own prior decision (Pet. App. 8a), the critical difference between the two cases is that in *Conroy* "the Tribal Court's partition of the trust property between two Indians did not divest the United States of its legal title to the property as trustee, but merely substituted different Indian beneficiaries."[5]

Petitioner, in citing *Bailess* v. *Paukune*, 344 U.S. 171 (1952), misapprehends the import of that decision. In that case, an Indian devised trust property to his non-Indian spouse. *Bailess* merely acknowledged that land so devised loses its character as trust property, and "there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the *cestui*" (*id.* at 173). Here, by contrast, the property in question remains trust property, with legal title vested in the United States, and the decedent has not devised the property to petitioner. In such circumstances, there is no applicable waiver of sovereign immunity to support an action seeking to require the United States to divest itself of legal title and give the property to petitioner.

b. As the court of appeals also correctly held, even if the district court had had a proper basis of jurisdiction its order could not stand. A court is without authority to

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[5] Petitioner (Pet. 7), citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *Kahn* v. *Shevin*, 416 U.S. 351 (1974), assails this distinction as "rank discrimination." But in *Bakke*, 438 U.S. at 304 n.42, the prevailing opinion specifically distinguished *Morton* v. *Mancari*, 417 U.S. 535 (1974), in which the Court has upheld legislation that singled out Indians for "particular and special treatment." Similarly inapposite is *Kahn*, in which the Court upheld the validity of a Florida statute that granted a property tax exemption to widows but denied it to widowers. The present case does not involve any distinction between widows and widowers: if the decedent had been an Indian woman and the surviving disinherited spouse a non-Indian male, the result would have been the same.

override an Indian's valid will. In *Blanset* v. *Cardin*, 256 U.S. 319, 326-327 (1921), the Court recognized the right of Indians to dispose of their property "free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior." In *Tooahnippah* v. *Hickel*, 397 U.S. 598, 608-610 (1970), the Court further recognized the limited authority of the Secretary when probating Indian wills, noting that the Secretary himself lacks "the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable.' " The district court's order in this case, however, is based on nothing more than subjective feelings about what is just and equitable. As the court of appeals properly held, such an order is improper on the merits.

Petitioner asserts (Pet. 6) that the Secretary improperly failed to modify the decedent's inventory of property to reflect petitioner's claim of entitlement to part of the trust property under a resulting-trust theory. Although 43 C.F.R. 4.273(a) provides for elimination of property from a decedent's inventory when "it is found that property has been improperly included," such claims arise, as the IBIA opinion in this case pointed out (Pet. App. 45a n.4), when "trust property titled to the decedent should have been titled to another, or * * * trust property titled to another should have been titled to the decedent." That, however, was not the essence of petitioner's claim before the agency or in the courts below.

Petitioner quotes (Pet. 5) part of a brief submitted by the Solicitor of the Department of the Interior in response to an IBIA order in this case (Pet. App. 40a) on the issue

of whether resulting purchase money trusts in Indian trust property could be recognized (Solicitor's Office Brief, Dkt. Nos. IBIA 83-53 and 84-4). The IBIA, after considering the Solicitor's views, agreed that, while resulting purchase money trusts in Indian trust land could "be recognized under appropriate circumstances" (Pet. App. 43a), such circumstances did not include a claim by a non-Indian (*id.* at 47a). The Solicitor had also stated that, although an administrative law judge has the authority under Department of the Interior regulations to modify a decedent's estate inventory if sufficient evidence is presented to show improper inclusion of certain assets, "such authority may not extend to curing defects which are based on a resulting trust theory" (Solicitor's Brief 5). Finally, the Solicitor specifically rejected the view adopted by the district court in this case that spousal contributions during marriage could form the basis for a claim under a resulting-trust theory.

Under applicable regulations, the Secretary was without authority to modify the decedent's inventory of property and to override the express terms of the will of the decedent. Petitioner cites *Akers* v. *Morton*, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975), in an attempt to show that the mere fact of asserting a claim in the decedent's trust property was sufficient to require the Secretary to modify the decedent's inventory of property (Pet. 7-8). In this case, however, the administrative law judge found no evidence to support petitioner's claim that she owned an interest in the trust property (Pet. App. 31a). Moreover, in *Akers*, an Indian husband had disinherited his Indian wife. There, the trust property had been acquired completely with the wife's funds although title was taken solely in the husband's name. Despite this fact, the wife had not asserted in the probate proceedings that the land had improperly been included in the decedent's inven-

tory of property. After an unsuccessful administrative challenge, the wife sued the Secretary of the Interior. The court of appeals, relying on *Tooahnippah*, rejected the widow's claim, noting that "[t]he Secretary may dispprove a will only if it is technically deficient or if it is irrational" (499 F.2d at 46-47). *Akers* thus supports the ruling of the court of appeals in this case.[6]

The court of appeals correctly held that petitioner's suit was barred by the QTA and that, even without the jurisdictional bar, the Secretary had no authority to override the express testamentary wishes of the decedent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1988

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[6] Furthermore, even if a non-Indian spouse inherits an interest in trust property, particularly an interest held jointly with Indian heirs, the property interest held by the non-Indian is very limited. Thus, "[h]e cannot, as a practical matter, manage, use, or lease the land except with the consent and agreement of all his Indian co-owners. His own interest, although free of the trust, is virtually unsaleable unless the trust is lifted as to all of his Indian co-owners upon their request." *Estate of Mary Ursula Rock Wellknown*, 78 Interior Dec. 179, 184 n.4 (1971).

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